IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 4.4.2006.

CORAM:

THE HONOURABLE MR.JUSTICE R.BALASUBRAMANIAN
AND
THE HONOURABLE MR.JUSTICE M.THANIKACHALAM

CRIMINAL APPEAL Nos.121,168,375,379,391,395,945 OF 2003
AND
CRL.A.No.1239 OF 2004.

John Pandian ... Appellant in Crl.A.No.121/2003
(Accused No.7)

S.Venkataramakrishnan alias
Venkatram alias Thambu ... Appellant in Crl.A.No.168/2003
(Accused No.1)

1.Kumar
2.Pavun Raj @ Pavun
3.Prince Kumar @ Prince @ Balan
... Appellants in Crl.A.No.375/2003
(Accused Nos. 9 to 11)

Ganesan ... Appellant in Crl.A.No.379/2003
(Accused No.8)

Sivakumar ... Appellant in Crl.A.No.391/2003
(Accused No.2)

1.Yusuf
2.Abdul Kareem @ Kareem ... Appellants in Crl.A.No.395/2003
(Accused Nos. 5 & 6)

Ubaiadulla @ Tamilsevan ... Appellant in Crl.A.No.945/2003
(Accused No.4)

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Vs.

State, represented by
Inspector of Police,
B-2 R.S.Puram Police Station,
Coimbatore,
Coimbatore District.
(Cr.No.1018 of 1993) ... Respondent in Crl.A.Nos.121,
168,375,379,391,395 and 945/2003.

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Crl.A.No.1239 of 2004:
State, rep.by
The Inspector of Police,
B-2 R.S.Puram Police Station,
Coimbatore.
(Cr.No.1018/1993) ... Appellant

Vs.

Subramaniam @ Subbukutty ... Respondent (Accused No.3)

* * *

Crl.A.Nos.121, 168, 375, 379, 391, 395, 945 of 2003 are filed under Section 374(2) Cr.P.C. and Crl.A.No.1239 of 2004 is filed under Section 378 Cr.P.C. all against the judgment dated 6.1.2003 made in Sessions Case No.149 of 1996 by the Additional Sessions Judge (Fast Track Court No.1), Coimbatore.

For Appellant in
Crl.A.No.121/2003 : Mr.V.Gopinath, Senior Counsel for
Mr.K.R.Krishnan

For Appellant in
Crl.A.No.168/2003 : Mr.N.Natarajan, Senior Counsel for
Mr.S.Kadarkarai

For appellants in
Crl.A.No.375/2003 : Mr.Gopalakrishna Lakshmana
Raju for Mr.T.R.K.Kumarasingh

For appellant in
Crl.A.No.379/2003 : Mr.K.Asokan, Senior Counsel for
Mr.Gopalakrishna Lakshmana Raju

For appellant in
Crl.A.No.391/2003 : Mr.S.Ashok Kumar, Senior Counsel for
Mr.AR.L.Sundaresan

For the first appellant
i.e. A.5 in Crl.A.
No.395/2003 : Mr.R.Sankarasubbu

For the second appellant
i.e. A.6 in Crl.A.
No.395/2003 : Mr.K.Asokan, Senior Counsel
for Mr.C.Muruganantham

For appellant in
Crl.A.No.945/2003 : Mr.K.Asokan,Senior Counsel for
Mr.D.Veerasekaran

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For respondent in
Crl.A.Nos.121,168,375,
379, 391, 395 and 945/2003
and for the appellant
in Crl.A.No.1239/2004: Mr.L.Nageswara Rao, Senior Counsel
for Mr.S.Jayakumar, P.P.

For respondent in
Crl.A.No.1239/2004 : Mr.M.Balasubramaniam

COMMON JUDGMENT

M.THANIKACHALAM, J.

A.7; A.1; A9 to A.11; A.8, A.2; A.5, A.6 and A.4, who stand convicted and sentenced to undergo life imprisonment by the judgment of the trial Court dated 6.1.2003, in Sessions Case No.149 of 1996, on the file of the Additional Sessions Judge (Fast Track Court No.1), Coimbatore, are the appellants in Crl.A.Nos.121,168,375, 379, 391, 395 and 945 of 2003 respectively.

2. The State, aggrieved by the acquittal of A.3 in the above Sessions Case, has filed Criminal Appeal No.1239 of 2004.

3. The prosecution brought the accused, to face the trial, before the trial Court for the offences under Sections 120-B, 302 r/w.109, 302, 302 r/w.34 IPC alleging that A.1/appellant in Crl.A.No.168 of 2003 had love affair with one Sunitha-P.W.3; that Sunitha not only refused to accede to the request of A.1, but preferred her classmate, by name Vivi @ Vivek @ Vivekanandan and also married him on 13.12.1991; that thereafter, A.1, had love affair with one Sherry, who was the Engineering College Student of an Institution owned by the family of A.1; that though A.1 married the said Sherry, later she was given in marriage to one Thomas by her parents and hence she left the country along with her husband, which upset A.1; that thereafter, in order to fulfil his earlier desire of marrying P.W.3-Sunitha, which has not vanished, A.1 hatched a conspiracy along with some of the accused to commit the murder of the husband of Sunitha viz. Vivek; that the persons, so engaged, had contacted A.7/the appellant in Crl.A.No.121 of 2003; that he had engaged A.8 to A.11 for the purpose of committing the murder of Vivek; that A.9 to A.11/appellants in Crl.A.No.375 of 2003 have executed the plan, viz. committing the murder of Vivek on 17.8.1993 at about 10.15 a.m. at Coimbatore, R.S.Puram, Diwan Bahadur Road near 'Richy-Rich' Restaurant, in order to facilitate A.1 to marry Sunitha; thereby all of them are liable to be dealt with under Sections 120-B, 302, 302 r/w.34 and 302 r/w.109 IPC.

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4. Upon committal, when the accused were produced/appeared before the Sessions Court, the learned II Additional Sessions Judge, Coimbatore, by going through the materials, satisfied himself, that the materials placed before him are prima facie sufficient to frame charges, to proceed further, and in this view, the learned II Additional Sessions Judge, framed the following charges, as per the order dated 5.8.1998:

Against A.1 to A.11 : under Section 120-B IPC,
against A.10 : under Section 302 IPC,
against A.9 and A.11 : under Section 302 r/w.34 IPC
and against A.1 to A.8 : under Section 302 r/w.109 IPC

5. All the accused, when questioned about the charges, explaining to them also, have refused to plead guilty, disputing the facts or the averments, alleged against them.

6. Thereafter, when the case came before the Additional Sessions Judge viz. Fast Tract Court No.1, Coimbatore, the learned Judge, by going through the materials, felt that the charges framed against A.9 to A.11 viz. original charges No.2 and 3, are not proper, reflecting the case of the prosecution. Therefore, he amended or recast the charges No.2 and 3, framing a charge under Section 302 against A.9 and a charge under Section 302 r/w.34 IPC against A.10 and A.11, as per the order dated 19.4.2002.

7. The accused, when questioned, refused to plead guilty for the amended charges also, thereby compelling the prosecution to make out a case, as projected and as reflected in the charges.

8. At the first instance, in order to prove the charges, on behalf of the prosecution, P.Ws.1 to 56 have been examined, seeking aid from Exs.P.1 to P.116 and M.Os.1 to 38. After the close of the prosecution evidence, the accused were also examined under Section 313 Cr.P.C., on 23.7.2002 bringing to their knowledge the incriminating circumstances available against them in the oral evidence of the prosecution witnesses. At that time, some of the facts were admitted, many of the facts were disputed by the accused, in addition to, filing statements also, which we will advert to infra, wherever it is necessary.

9. At the instance of the prosecution, on application, the prosecution case was reopened, then P.Ws.57 to 60 have been examined on 3.10.2002, marking Exs.P.117 to 121. After the closure of the prosecution evidence second time also, the accused were examined under Section 313 Cr.P.C., on 17.10.2002 for which they have disputed the oral evidence of prosecution witnesses, which are incriminating against them, in addition to marking Ex.D.1. No oral evidence has been let in or any other document has been produced on behalf of the accused, though sufficient opportunities were given to them, to defend the case, if possible to shatter the case of the prosecution.

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10. The learned trial Judge, while evaluating the above materials, scanned them to his best effort, assessed them based upon legal principles, which brought to surface the offences against A.1, A.2 and A.4 to A.8 under Sections 120-B and 302 r/w.109 IPC. The evidence also brought to surface the guilt of A.9 under Section 302 and 120-B IPC, in addition the offence against A.10 and A.11 under Sections 120-B and 302 r/w.34 IPC.

The learned trial Judge, repelling the defence, accepting the case of the prosecution to the major extent, has reached the conclusions, viz.;

i) that A.1, though P.W.3 Sunitha was married to Vivek, had an eye or continuous liking over her and in order to attain that desire, he should have conspired;

ii) that in order to execute the conspiracy part, A.1 had withdrawn a sum of Rs.3 lakhs from his company account, on 30.7.1993, by issuing a self-cheque, which was encashed by A.2;

iii) that at the request of A.1, A.2 should have taken A.4 to A.6 to Tirunelveli, having reserved the journey, through train, on 17.7.1993;

iv) that A.4 and others stayed at Tirunelveli on 17.7.1993 and 1.8.1993, wherefrom they have also contacted A.7, over phone;

v) that since A.7 was not available and had been to Chennai, A.2 and A.4 to A.6 have travelled to Chennai and contacted A.7 at M.L.A.Hostel, Chennai, where A.7 was staying;

vi) that from Chennai, they have travelled, by train, to Coimbatore and thereafter, the amount of Rs.3 lakhs was encashed by A.2 on a self-cheque issued by A.1, on 30.7.1993, as stated above, and paid to the hirelings

vii) that though the hirelings have made an attempt to assault Vivek, in view of the bundobast, on account of serial bomb blasts at Coimbatore, they were unable to execute the same at the first instance;

viii) that then, having returned to Tirunelveli, once again A.9 to A.11 travelled in the car driven by A.8, went to Ooty, returned on 17.8.1993 and precisely executed the murder, as planned; and

ix) that the investigation so did in fine established all the above facts, without any snap, anywhere, thereby, by strong threads netting, not allowed A.1, A.2 and A.4 to A.11 from escaping the clutches of law and in this view, they should be punished inflicting appropriate punishments.

11. Thus concluding, the learned trial Judge convicted A.1, A.2 and A.4 to A.8 under Section 120-B and 302 r/w.109 IPC. A.1 was sentenced to undergo life imprisonment and to pay a fine of Rs.2 lakhs in default to undergo simple imprisonment for a further period of one year under Section 120-B IPC. A.2, A.4 to A.6 and A.8 were

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sentenced to undergo life imprisonment under Section 120-B IPC and to pay a fine of Rs.2,000/= each, in default to undergo simple imprisonment for a further period of six months. A.7 was sentenced to undergo life imprisonment under Section 120-B IPC and to pay a fine of Rs.1 lakh, in default to undergo simple imprisonment for a further period of six months. Since A.1, A.2 and A.4 to A.8 were sentenced under Section 120-B IPC, no separate sentence was awarded under Section 302 r/w.109 IPC.

12. A.9 was convicted for the offence under Section 302 and 120-B IPC and sentenced to undergo life imprisonment and to pay a fine of Rs.20,000/=, in default to undergo simple imprisonment for a further period of one year.

13. A.10 and A.11 were convicted for the offences under Sections 120-B and 302 r/w.34 IPC and they were sentenced to undergo life imprisonment for the said offences and to pay a fine of Rs.2,000/= each, in default to undergo simple imprisonment for a further period of six months.

14. Taking into consideration the sufferings of the victim and his Legal Representatives, the learned trial Judge has ordered a compensation of Rs.1,50,000/= to the legal heirs of the deceased, from the fine amount imposed and realised from A.1 and A.7.

15. The learned trial Judge was of the view that no offence has been made out as far as A.3 (the respondent in Criminal Appeal No.1239 of 2004) is concerned, and in this view, he acquitted A.3 from all the charges.

16. Aggrieved by their conviction and sentence, A.1, A.2, and A.4 to A.11 have preferred the Criminal Appeal Nos.121,168,375, 379, 391, 395, 945 of 2003 and aggrieved by the acquittal of A.3, the State has preferred Criminal Appeal No.1239 of 2004.

17. The facts, leading to the filing of the final report, followed by trial, ending in conviction of A.1, A.2 and A.4 to A.11 and acquittal of A.3, resulting these Criminal Appeals, shorn of unnecessary details, as exposed by the prosecution witnesses, briefly are as follows:

i) Thiru Venkataramakrishnan alias Venkatram alias Thambu-A.1, Tmt.Sunitha-P.W.3, Ramganesh-P.W.5, Sivakumar-P.W.6, Krishnaraj-P.W.10, Manojkumar-P.W.27 and Vivek-the deceased in this case, are the collegemates, since they were doing their under-graduation in P.S.G.College, Coimbatore, between 1985 and 1988. Vivek is the brother of P.W.2 Abhiramavishnu and they are the sons of P.W.1-Krishnaraj Kaalingarayar. A.1 and Vivek belong to rich families, in their respective areas.
ii) A.1 had a deep liking towards P.W.3-Sunitha because of her charming personality or otherwise, whereas she fell in love

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with Vivek, son of P.W.1. But, on one occasion, when A.1 conveyed his desire, to P.W.3, to marry her, she replied, that since she is in love with Vivek, she wanted to marry Vivek alone thereby rejecting or turning down the desire, causing upset to him. However, A.1 requested P.W.3 not to divulge the same to anybody. The fact that P.W.3-Sunitha was having love affair with Vivek and that they have also decided to marry, known to their friends and collegemates, including P.Ws.5,6,10 and 27.

iii) The marriage proposal between Vivek and P.W.3-Sunitha was postponed because of the reason Vivek wanted to gain some experience, in the financial business, for which he intended to take training at Salem, where his uncle was having financial business. Therefore, Vivek and P.W.3 have postponed their marriage and P.W.3 also assured that she would be waiting.

iv) Vivek, after completing the training, with his uncle at Salem, commenced his business in the name and style of Nayagam Investments and Nayagam and Co. Thus, after settling in the life, Vivek informed his father-P.W.1 about his desire to marry Sunitha, further informing about his love affair, which P.W.1 also heard through the friends of Vivek. Thereafter, with the consent of the parents of Vivek and Sunitha, their marriage was celebrated, in a grand manner, on 13.12.1991.

v) A.1, who was not successful in his desire to marry P.W.3-Sunitha, had developed intimacy with one Sherry, the daughter of P.K.Zacharia-P.W.11, who was studying B.E. in V.L.B.Janakiammal College of Engineering and Technology, Coimbatore, run by the family members of A.1. A.1 convincing Sherry or otherwise, married her on 6.5.1990 at a temple in Tiruppur, and the marriage was also registered in the Office of Sub Registrar, Palghat, Kerala, on 11.5.1990 under Ex.P.2, not known to her father.

vi) The father of Sherry, i.e. P.W.11, arranged the marriage of his daughter and she also got married to one George Thomas on 4.1.1993 at Syrian Orthodox Cathedral Church, Trivandrum, Kerala. When this fact came to the knowledge of A.1, he went to the place of P.W.11 and informed him, that he had married his daughter Sherry, showing the Marriage Registration Certificate also. P.W.11 questioned the conduct of A.1, as to why he has not taken any action for the past three years, thereby doubting the marriage between A.1 and Sherry. P.W.11 realising the seriousness of the matter, requested A.1, as to when and how the marriage was celebrated, for which, at a later point of time, A.1 produced some more documents, as if he married Sherry. On seeing these documents, P.W.11 questioned his daughter Sherry, who informed the father, in the presence of A.1, that she had no connection, whatsoever, with A.1 and she is willing only to live with her husband George Thomas. Because of the stand taken by Sherry, A.1 was very much disappointed and in fact, Sherry went to Sharjah

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along with her husband Thomas.

vii) A.1, unable to get Sherry also, became once again upset and he initiated proceedings, to snap the relationship, with Sherry, by filing a petition on 12.5.1993, under Section 13 of the Hindu Marriage Act, 1955, in H.M.O.P.No.150 of 1993 before the Vacation Civil Judge, Coimbatore, which was later transferred to the Sub Court, Coimbatore and re-numbered as H.M.O.P.No.182 of 1993, seeking dissolution of his marriage with Sherry, as seen from Ex.P.7. Thereafter, Sherry also filed a suit in O.S.No.1458 of 1993 on the file of the District Munsif, Coimbatore, to declare her as a Christian; to declare the alleged marriage between herself and A.1 on 6.5.1990 as void and also to declare that the alleged marriage agreement, dated 11.5.1990 is also void. Since both parties entered into a compromise, the said suit, filed by Sherry, was decreed, as per terms and conditions of the compromise petition in I.A.No.1740 of 1993, on 28.7.1993, as seen from Ex.P.13. Pursuant to the said compromise, the H.M.O.P., filed by A.1, was dismissed, as not pressed, on 27.8.1993, as also seen from Ex.P.7. Thus, A.1 had depression in his life, in not getting a girl of his choice, not only at the first time but also at the second time.

viii) As friend, A.1 used to go to the house of P.W.3 and Vivek, where their other friends also used to assemble. The friends-P.Ws.5,6,10 and 27 advised A.1, to marry somebody and lead a peaceful happy life. A.1 having idea to marry, had constructed a palatial bungalow, at a cost of Rs.40 lakhs, as well as purchased diamond ear-studs -M.O.16, which were shown to P.W.3. On seeing the plight of their friend, when P.W.3 and her husband have advised A.1 to marry somebody, he told them that if an intelligent girl like Sunitha is available, he would marry her. When A.1 and his classmate P.W.10-Krishnaraj had some general discussion also, A.1 had informed him that Vivek was a gifted man, since he got a wife like Sunitha, further telling him that if Sunitha had not married Vivek, he would have tried and got married her. The fact, because of the love failure at the fist instance and because of the matrimonial failure at the second time, A.1 became upset, known to his friends viz. P.Ws.5,6,10 and 27.

ix) A.1, who was upset and dejected, because of the fact, Sherry also refused to live with him, it appears, had planned to commit murder of Vivek, in order to get P.W.3, since the image of P.W.3 has not vanished from his mind, due to previous love and the subsequent intention to have her, as his wife. In this way, having conspired, planning to commit murder of Vivek, he requested his office boy-A.2 to make arrangements, since he knew A.4 to A.6, who are known to A.7, a mercenary capable of lending hirelings, for professional murder.

x) In order to go to Tirunelveli via Madurai, to contact A.7 in person, at the first instance, A.2 reserved railway tickets for him, along with A.4 to A.6, under Ex.P.14, went to

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Madurai, where from all of them went to Tirunelveli, and stayed at Janakiram Lodge, owned by P.W.23-Ramkumar. In the Lodge, A.4, though his name is Ubaiadulla, had stayed in the name of Tamilsevan along with A.2 and A5 and A.6 in Room Nos.409 and 407, for which in Ex.P.20 necessary entry was made. The accused while staying at Janakiram Hotel, have attempted to contact A.7, over phone (72324), from Room No.409, for which they have paid phone call charge, as indicated in Bill-Ex.P.22. They have vacated the rooms, on the same day, paying the charges also, and the counterfoil of the Bill is Ex.P.21. Since A.7 was not available at Tirunelveli, they went to Chennai, since it came to their knowledge, that A.7 was staying at M.L.A.Hostel, Chennai.

xi) While A.7 was staying at the M.L.A.Hostel, Chennai, in the room of Se.Ku.Thamilarasan, MLA., which was given to one Baskaran, as his Guest (Ex.P.8), as per the entries in Exs.P.9 to P.12 many people have met him, as spoken by P.W.18, on the basis of records. There, getting instructions from A.7, A.2 and A.4 to A.6 have travelled from Chennai to Coimbatore on 19.7.1993, in Nilgiris Express, making reservation under Ex.P.16, for which reservation chart was given under Ex.P.17.

xii) Pursuant to the conspiracy, in order to meet the expenses, A.1 had issued a self-cheque (Ex.P.24), for Rs.3 lakhs on 30.7.1993 and handed over the same to A.2, for encashment, which was encashed by him from the Lakshmi Vilas Bank, where P.W.24-Krishnamurthy was working as Manager, which is also evidenced by Exs.P.23 to 25. When P.W.24 had some doubt, about the identity of A.2, he requested P.W.25-Sabapathy to identify A.2 and on identification alone, the amount was paid to A.2. When P.W.25 told A.2, whether he could inform the encashment to the Mill, A.2 said to him, not necessary.

xiii) On 1.8.1993, A.4 went to Tirunelveli and stayed in Blue Star Hotel, in the name of Tamilsevan, where P.W.26-Ramasubramaniam was working as a Receptionist. At the time of his stay, entry was made in Ex.P.26 in which he had also signed. When he vacated the room, at about 3.00 p.m., a bill was issued and the counterfoil is Ex.P.27. During his stay, he has made a local cal (probably to A.7), though the number is not known, because of the absence of electronic recording. According to the prosecution, it must be to John Pandian-A.7.

xiv) A.8 to A.11 are very much known to A.7 and in fact, when there was an agitation opposing the arrest of A.7, A.9 also participated, for which a case was also registered, as spoken to by P.W.33-the then Inspector of Police, Tirunelveli Taluk Police Station, in Cr.No.155/1993 of Tirunelveli Taluk Police Station, under Sections 147,148,341,506(II), 435 and 307 IPC and under Section 2 of the Tamil Nadu Damage to Public Properties Act. Ex.P.33 is the FIR in that case. P.W.33 also arrested A.9 in that case and remanded him as disclosed by

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Ex.P.34.

xv) In the first week of August 1993, in view of the heavy bundobust, provided in R.S.Puram area, due to serial bomb blasts, that rocked Coimbatore and other illegal activities, as determined, A.9 to A.11 were unable to carry out the command of A.7 i.e. murdering Vivek.

xvi) Some of the accused, in the name of Pandian, Palanganatham Madurai, stayed at Coimbatore Vijaya Lodge, situated at Geetha Hall Road, between 2.8.1993 and 6.8.1993. For the stay on 2.8.1993, a single room was booked at the first instance, as spoken by P.W.28, for which Ex.P.29 was given. During their stay, they have gone to the STD Booth of P.W.39, from where they have contacted A.7 through phone, which is exposed by Ex.P.53. When A.4 to A.6 were together, P.W.30, a gunny merchant has seen them, that too while they were conversing about the dispute between Vijayalakshmi Mills owner and a finance business owner, who is having his business at R.S.Puram (probably meaning the deceased).

xvii) A.8, without informing the owner of the vehicle-TAC 5667 P.W.32, appears to have taken the vehicle for the travel of A.9 to A.11, to Coimbatore, Ooty and failed to return forthwith, resulting in a complaint by him to P.W.36-the then Sub Inspector of Police, CCB-II, Tirunelveli. That complaint is Ex.P.32 and the General Diary entry for the same is Ex.P.37.

xviii) A.8 to A.11 travelled in the car, owned by P.W.32 to Ooty, and returned for which there is an entry in the Paraliar Check Post which is spoken by P.W.43, supported by Exs.P.61 and 62. While they were at Ooty, they have stayed at Aarthi Lodge on 16.8.1993, where P.W.44 was working as Receptionist in the year 1993. For the stay of A.9 along with three others, entries were made in the Lodge Register-Ex.P.63, at page 112. They have vacated the room on 17.8.1993 at 6.00 a.m.

xix) A.8 to A.11 returned from Ooty on 17.8.1993 and as planned, they had been to Diwan Bahadur Road, R.S.Puram Coimbatore, near 'Richy Rich' Restaurant waiting for Vivek. The business premises of deceased Vivek was near 'Richy Rich' Restaurant, in the complex called MRS Complex. Mr.Vivek, in order to attend to his day-to-day routine work, came there, in his car, alighted from the car and proceeded to his office. At that time, A.10 and A.11 restrained him, from going further, while A.9 attacked him with M.O.1, cutting his neck, causing other injuries also, which was witnessed, not only by P.Ws.14 to 16, but also by some other persons, who are nearby, since the incident had taken place at about 10.15 a.m. in the morning, in a busy locality. P.W.16, who was working as Watchman in a jewellery shop called 'Prithvi Jewellery' at D.B.Road, R.S.Puram, seeing this incident, informed the same to the Manager of Vivek's office-Valliyappan, who rushed to the scene

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of crime. After committing the murder, A.9 to A.11 escaped in the car, driven by A.8. While escaping from the scene of crime, one of them (A.10) had left the chappal-M.O.7. Some one who had seen the incident informed thourgh phone to the Police Control Room, which ws attended by P.W.46, who in turn informed it, through V.H.F., to the Inspector of B2 Police Station, for which he made Ex.P.64 entry.

xx) Pursuant to the complaint under Ex.P.32, lodged by P.W.32, owner of the car, when the enquiry was contemplated by P.W.36, A.8 appeared along with P.W.32, before P.W.36. Because of the reason that car has returned, P.W.32 withdrew the complaint, that too on the certificate given by A.7, by coming to the Police Station, on 19.8.1993. Thus, it isseen, from 15.8.1993 to 18.8.1993, A.8 was away, probably with A.9 to A.11, taking them to Ooty, then to Coimbatore, then returning to Tirunelveli, after commission of the offence, as stated above.

xxi) The gruesome murder, which took place on 17.8.1993 at 10.30 a.m., was informed, through VHF by P.W.46 to the then Inspector of Police, R.S.Puram, Thiru Rathinasabapatby-P.W.56. Immediately, P.W.56 rushed to the scene of crime, where he had noticed the dead body of Vivek with cut injuries near 'Richy Rich' Restaurant, who was identified, by Valliyappan, the Manager working in the Finance Company, owned by the deceased Vivek.

xxii) Then, obtaining the statement of Valliyappan, the Manager of the Finance Company owned by the deceased, under Ex.P.102, P.W.56 registered a case in Cr.No.1018/1993 of B2 R.S.Puram Police Station, under Section 302 IPC, at about 11.00 a.m., for which he submitted the printed FIR-Ex.P.103 to the Judicial Magistrate No.1, Coimbatore. Then, returning to the scene of crime, summoning the panchayatdars, he conducted inquest, at about 11.30 a.m., prepared inquest report-Ex.P.105. Observing the scene of crime, in the presence of P.W.37 and another, he has prepared observation mahazar-Ex.P.30, as well as recovered bloodstained earth, sample earth-M.Os.2 and 3, leather bag-M.O.4, spectacles-M.O.5, Identity card of Vivek-M.O.6, as well as a pair of chappal-M.O.7, under the cover of mahazar-Ex.P.41. P.W.56 also prepared sketch-Ex.P.104. He had examined the witnesses, recorded their statements then and there. Completing the initial formalities, including the preparation of the inquest report, which brought to surface, prima facie, homicidal violence, yet, to ascertain the cause of death of the deceased medically, giving requisition under Ex.P.76, P.W.56 arranged for the Post-Mortem through P.W.47. He has also informed the matter to the higher authorities.

xxiii) Dr.Natarajan-P.W.51, on receipt of Ex.P.76 requisition, upon identification of the body of Vivek, conducted autopsy over the body of Vivekanandan @ Vivek at about 2.00 p.m. on 17.8.1993. During the autopsy, the Doctor had noticed the following injuries, which are incorporated in Ex.P.77-Post

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Mortem Certificate:

"1.Horizontal cut injury seen from the top of right shoulder to the root of the neck up to the 4th cervical vertebra 33 x 12 cm. bone deep. Tip of the lateral end of the clavicle is sliced along the line of the injury. The soft tisses of the neck are severed in the direction of the injury. 4th cervical vertebra is also cut in its middle with severance of the spinal cord. The injury is directed latero medially margins are uniformly regular. Floor of the injury contained blood clots.

2. An oblique cut injury extending from the middle of the chin to the Rt. lateral aspect of the neck 20 x 3 cm. muscle deep. The soft tissues and the blood vessels are severed.

3. Horizontal cut injury 12 x 3 cm. bone deep from the middle of right cheek to the right lateral aspect of the neck with tailing in the neck. The wound is 4 cm. below the right ear.

4. Oblique cut injury 4 x 2 cm. bone deep in the right sub occipital region of the head.

5. Oblique cut injury 12 x 2 cm. bone deep tailed off in cuts lower end seen 1 cm. above the injury No.4 and parallel to it.

6. Oblique cut injury 9 x 2 cm. bone deep in the right half of the occipital region of head to the right mastoid region behind the right ear. The underlying bone is also cut along the line of the injury for 8 cm.

7. Oblique cut injury 11 x 2 cm. bone deep from the verte to the left parallel region with a cut in the underlying bone.

8. Horizontal cut injury directed lateral to medial from the upper most of the chin just below the lower lip right side running along the upper border of the mandible left side cutting through the soft tissues and right central and lateral incisor teeth of lower jaw along with left central lateral incisor teeth and canine teeth and the upper border of the mandible. The above mentioned teeth are found broken. The wound is 10 x 1 cm. bone deep. The margins of all the above injuries are uniformly regular and are all antemortem in nature."

By going through the external injuries, as well as the corresponding internal injuries, the Doctor was of the opinion that the deceased would appear to have died of haemorrhage as a result of multiple cut injuries, of which external injuries No.1 and 2 and these corresponding internal injuries are essentially fatal. He has also opined that the death should have been instantaneous and the deceased would have died about 36 hours prior to post-mortem. After Post-Mortem, P.W.47 handed over M.Os.21 to 26, recovered from the body to the Inspector of Police, under a Special Report-Ex.P.65.

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xxiv) In continuation of the investigation, P.W.56 examined Ramganesh-P.W.5, Sivakumar-P.W.6, Ilango-P.W.7 and other witnesses and recorded their statements. Thereafter, on 19.8.1993, he has examined Abhiramavishnu-P.W.2, Krishnaraja Kaalingarayar-P.W.1 and P.W.3-Sunitha, wife of the deceased. As informed by P.W.45-the then Sub Inspector of Police, when P.W.56 attempted to examine A.1, he was not available, either in his office or in the house etc.

xxv) On 21.8.1993, on the basis of the information, gathered, from the Members of the Investigation Team, P.W.56 examined the eye-witness Paraman @ Paramasivam-P.W.15-an auto-driver and made arrangements to secure the other eye-witnesses, who might have seen the incident. Since the investigation revealed the involvement of A.1, P.W.56 has also recovered the self-cheque Ex.P.24 from the Lakshmi Vilas Bank and examined the connected persons, recording their statements. He has also recovered the attendance register of the company owned by A.1, which is marked as Ex.P.106.

xxvi) Upon information, about the whereabouts of A.2, P.W.56 arrested him on 29.8.1993 at about 2.15 p.m., in the presence of Veerasamy-P.W.38 and one Rajan. At the time of arrest, A.2 was carrying a yellow bag-M.O.9, which contained cash of Rs.1 lakh-M.O.8, which were recovered in the presence of the same witnesses, under the cover of mahazar Ex.P.43. Upon examination, without any influence, A.2 confessed under Ex.P.42, that if he is taken to his house, he would hand over Rs.21,000/=. Thereafter, A.2 took the Investigating Officer, P.W.38 and another to Rajaveedhi, near Thermutty and upon identification by him, P.W.56 arrested A.4 and A.6 at 3.00 p.m., in the presence of the same witnesses. When P.W.56 examined A.4, he has given a confessional statement, the admissible portion of which is marked as Ex.P.44 and A.6 gave a confession statement, the admissible portion of which is marked as Ex.P.45.

Xxvii) Pursuant to ex.P.42, A.2 took them, to his house at Kuniamuthur, and handed over Rs.21,000/= taking the same from a trunk box, which was recovered under Ex.P.46. Then, pursuant to Ex.P.44, under the cover of mahazar Ex.P.47, M.O.11-Titan wrist watch and M.O.12-cash of Rs.23,000/= were recovered from the house of A.4 and pursuant to the confession statement of A.6, under the cover of Ex.P.48, M.O.13-gold chain, M.O.14-cash of Rs.18,000/= and M.O.15-scooter bearing Registration No.TCW 8691 were recovered from the house of A.6 in the presence of same witnesses.

xxviii) Thereafter, A.2,A.4 and A.6 took the Investigating Officer and the mahazar witnesses to the house of A.1, where P.W.56 arrested A.1 at 6.30 p.m. in the presence of P.W.38 and another. Upon examination, A.1 confessed to hand over the

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photograph of Sunitha as well as the Diamond ear-studs. The admissible portion of the confession statement of A.1 is Ex.P.49. Pursuant to the confession statement of A.1, under Ex.P.50-mahazar, M.O.16-pair of diamond ear-studs and M.O.17-photo of P.W.3 Sunitha were recovered at 7.30 p.m. on the same day, in the presence of same witnesses. After completing the above part of investigation, A.1, A2 and A.4 were sent to Police Station, with a police team.

xxix) Then, A.6 disclosing the whereabouts of A.8, took the Investigating Officer to Sudharshan Lodge at Udumalpet-Dharapuram road and identified A.8, who was staying there, in Room No.213. After arresting A.8, when he was examined in the presence of P.W.38, he gave a confession statement and the admissible portion of which is Ex.P.51. Pursuant to the confession statement, A.8 identified the car bearing Registration No.TAC 5667-M.O.18, and also took out from the back seat of the car, Rs.13,000/= (M.O.19) and a cut photo of Vivek M.O.20, which were recovered by P.W.56, under the cover of mahazar-Ex.P.52.

xxx) On 30.8.1993, A.6 identified the STD Booth, owned by one Mohammed Rafi-P.W.39, wherefrom the call roll of the STD Booth No.30893-Ex.P.53 was recovered, which disclosed that the accused have contacted Tirunelveli Telephone No.72324 belonging to A.7. The properties recovered and the documents seized were submitted to the Court, in addition arrested accused were remanded to judicial custody. A.5 surrendered before the Judicial Magistrate No.6, Coimbatore, which was informed to P.W.56 on the same day.

xxxi)On 31.8.1993, when the Investigating Officer was in search of the absconding accused, he was given to understand that A.3 also surrendered before the Judicial magistrate, Palladam. On 1.9.1993, in continuation of the investigation, P.W.56 made arrangements, for recording the statements of A.1 to A.3 and A.5 under Section 164 Cr.P.C. He had also examined P.W.15-Paraman @ Paramasivam, Auto Driver, and recorded his statement, since the Investigating Team has identified P.W.15 only on that day. Then, examining the persons in VLB Textiles and Vijayalakshmi Mills, he had recovered the Minutes Book-Ex.P.108, which contained the signature of A.1. He has also recovered the registers from the Hotel and other places, where the accused stayed, pursuant to the conspiracy.

xxxii) P.W.56, in continuation of his investigation, on 4.9.1993, went to Chennai in search of A.7 and A.9 to A.11, searched in several places as well as recovered the documents, by examining P.W.18. He was informed from Tirunelveli that A.10 and A.11 surrendered before the Judicial Magistrate, Thenkasi. Examining the railway officials, he has also recovered the

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railway reservation slip and connected records. He has also given requisition for conducting identification parade of the accused-A.10 and A.11.

xxxiii) Pursuant to the requisition given by P.W.56, identification parade was conducted, by the Judicial Magistrate No.I, Coimbatore-P.W.54 on 15.9.1993 wherein P.Ws.14 to 16 have identified A.10 and A.11, as if they were present at the scene of crime, for which P.W.54 prepared the proceeding, reports-Ex.P.84.

xxxiv) In continuation of the investigation, P.W.56 also recovered the cash book, bank book and other connected records of VLB Textiles and they are Exs.P.109 to 112. On the basis of the identification parade conducted, on 16.9.1993, the Investigating Officer has examined P.Ws.14 to 16 and recorded their further statements.

xxxv)After getting an order from the Judicial Magistrate No.1, Coimbatore, the Investigating Officer-P.W.56 took police custody of A.10 and A.11. Upon examination in the presence of P.W.40, separately on 16.9.1993 4.30 p.m., they have confessed to hand over of the balance of cash, which they have received, including the photo of A.7 and the admissible portions of the confessions of A.10 and A.11 are Exs.P.54 and P.55 respectively. Pursuant to the confession statements, from the house of A.11, cash of Rs.2,000/= (M.O.35) and a gold chain weighing 12 gms.-M.O.36 were recovered under Ex.P.113 on 17.9.1993. Thereafter, pursuant to the confession statement given by A.10, from his house a sum of Rs.5,000/= with a cover containing the name "Vijayalakshmi Mills"-M.O.37 and the photo of A.7-M.O.38 were recovered under Ex.P.114.

xxxvi) In order to ascertain the stay of A.6, P.W.56 went to Janakiram Lodge, Tirunelveli and recovered the connected documents, after examining P.W.23. Similarly, for the stay of A.4 also, documents were recovered. In order to ascertain the stay of A.10 and A.11 at Ooty, he took them there and on identification of Aarthi Lodge, he examined the witnesses and recovered the documents also. By examining the Coonoor Tahsildar, Paraliyar Check Post Register was recovered where there was an entry about the crossing of the car TAC 5667.

xxxvii) On 21.9.1993, he gave a requisition to the Judicial Magistrate No.1, Coimbatore for taking the footprints, specimen signatures and specimen handwritings of A.10 and A.11.

xxxviii) On 30.9.1993, he received information that A.7 surrendered before the Judicial Magistrate, Ponneri. On 23.10.1993, he received information that A.9 surrendered before the Judicial Magistrate No.6, Madurai and he was to be produced before the Judicial Magistrate No.1, Coimbatore.

xxxix) On 27.10.1993, P.W.56 requested the Chief Judicial Magistrate, Coimbatore, to appoint a Magistrate to conduct identification parade. Accordingly, P.W.54 conducted the identification parade, in order to identify A.9 by P.Ws.14 to

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16, out of whom, two witnesses have alone identified A.9, whereas P.W.15 failed to identify and the report is Ex.P.85.

xl) The Investigating Officer approached the Judicial Magistrate No.1, Coimbatore viz. P.W.55, by an application dated 15.9.1993, requesting permission to obtain the footprints of A.10 and A.11. Pursuant to the same, the footprints of A.10 and A.11 were taken and they are Exs.P.87 and P.88 and the connected proceedings are Exs.P.88 and P.89. Similarly, P.W.56 also applied to the Judicial Magistrate to obtain the specimen signature of A.2 and A.4. After receiving the objection and rejecting the same, permission was granted to take the specimen signatures of A.2 and A.4. The specimen signatures and handwritings of A.2 is Ex.P.90 and the specimen signatures and handwritings of A.4 is Ex.P.91. The proceedings for taking the specimen signatures and handwritings is Ex.P.92. Similarly at the request of the Investigating Officer, from A.10 specimen signatures were taken under Ex.P.93 and from A.11, Ex.P.94 specimen signature was taken. The connected proceedings are Ex.P.95.

xli) From A.1, Ex.P.96 specimen signature was taken and from A.9, Ex.P.97 specimen signature and handwritings were taken. The proceedings for taking the above specimen signatures is Ex.P.98. At the request of the Investigating Officer, the footprint of A.9 was taken under Ex.P.99, as per the proceedings in Ex.P.100.

xlii) Thiru R.Srinivasan-P.W.42 Handwriting Expert, who was then working as Assistant Director in the Forensic Department, at the request of the Investigating Officer, examined the signatures of A.2 with the signatures available in the cheque-Ex.P.24 as well as his signature in Ex.P.16. He has also examined the signatures available in Exs.P.21,P.26, P.29 with the signature of A.4 obtained in the Court. The comparison revealed that A.2 signed in the cheque and A.4 signed in the documents in question (lodge records), for which he has given his opinion under Ex.P.59.

xliii) Thiru Ranjit Check, who has been examined as P.W.50, examined the footprints of A.9 to A.11, with the impressions available in the chappal-M.O.7, recovered from the scene of crime, which revealed that the chappal, recovered from the scene of crime, must be that of Pounraj-A.10, for which he has submitted the report-Ex.P.75, assigning reasons. It also further revealed that the footprint impression found in the chappal do not belong to other two accused viz. A.9 and A.11. At the request of the Investigating Officer, Material Objects recovered were sent to chemical examination, through Court, reports were received.

xliv) Upon receiving expert opinion and by going through the statements recorded, as well as the material objects recovered

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during the investigation, the Investigating Officer, came to the conclusion that because of the conspiracy hatched between the accused, they should have committed the murder of Vivek, for which, all the accused should be dealt with and in this view, a final report came to be filed, leading to trial, ending in conviction of A.1, A.2 and A.4 to A.11 and acquittal of A.3, as stated above, which is under challenge in these Appeals.

18. Heard Mr.V.Gopinath, Senior Counsel for Appellant in Crl.A.No.121/2003; Mr.N.Natarajan, Senior Counsel for Appellant in Crl.A.No.168/2003;Mr.Gopalakrishna Lakshmanan for appellants in Crl.A.No.375/2003; Mr.K.Asokan, Senior Counsel for the appellant in Crl.A.No.379/2003; Mr.S.Ashok Kumar, Senior counsel for the appellant in Crl.A.No.391/2003; Mr.R.Sankarasubbu for the first appellant i.e. A.5 in Crl.A.No.395/2003; Mr.K.Asokan, Senior Counsel for the second appellant i.e. A.6 in Crl.A.No.395/2003 and for the appellant in Crl.A.No.945/2003. We have also heard Mr.L.Nageswara Rao, Senior Counsel appearing for the prosecution and Mr.M.Balasubrasmanim, for the respondent/A.3 in Crl.A.No.1239 of 2004.

19. Mr.N.Natarajan, learned senior counsel appearing for A.1, submitted that there is no motive, giving immediate impelling reason, to commit the murder of Vivek, in view the admitted position, as disclosed by the prosecution witnesses, that there was no strained relationship even between A.1 and the deceased or P.W.3 had no grievance against A.1; that the conspiracy part pleaded remains only as dead letters and in the absence of sufficient materials, it also vanished in the air, which would follow roping in A.1, as if he is the cause of conspiracy, leading to other incident, is an impossibility; that there is no material, ruling out the possibility, leading to the only conclusion that A.1 should be the cause for the murder of Vivek; others hand might not have been involved and that the materials produced to connect A.1, if any, are not sufficient to connect the circumstances relied on, warranting the irresistible conclusion, to come to a decision, that A.1 should have conspired along with others, in order to commit the murder of Vivek, for the purpose of marrying P.W.3, since P.W.3 herself has not stated anything against A.1.

20. Elaborating the above submissions, taking us through the entire evidence, pointing out the probabilities and improbabilities, a strenuous submission was made by the learned senior counsel, that no case has been made out against A.1 and this being the position, convicting A.1 under Section 120-B and 302 r/w.109 IPC is an impossibility and in this view, the interference of this Court is a must, to rectify the mistake committed by the learned Sessions Judge.

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21. The learned senior counsel and other counsel appearing for other accused, would submit that to connect A.4 to A.6 with other accused or to connect them with A.2, as if he had contacted them, who in turn have contacted A.7, who in turn should have engaged A.9 to A.11, practically, there is nil evidence and the evidence so collected, such as entries in the lodge registers, railway reservation slips etc. are not proved, as if these accused were parties to the above said documents and they are inadmissible evidence, this being the position, connecting A.2 and A.4 to A.6 with the crime, as if they have moved the first part of the conspiracy, in contacting A.7, is erroneous. It is their further submission, confessions, followed by the alleged recovery of material objects are not legally proved, which will not enable the court, to affix the seal of culpability, against the accused. In support of the above contention, the learned senior counsel appearing for A.2 and A.4 to A.7 had taken us through the documents, its admissibility or otherwise and how those documents cannot be taken as evidence and this being the position, placing reliance on those documents, convicting these accused is erroneous and legally not sound.

22. Mr.Sankarasubbu, the learned counsel appearing for A.5, would also contend that practically, there is no evidence at all to connect A.5, with the crime, the further fact being nothing has been recovered from A.5 also, either after arrest or taking him into custody, which was not properly considered by the Court below, resulting an erroneous conclusion, as if A.5 also had took part in the conspiracy and in this view, he submits, the conviction and sentence imposed on A.5 should go.

23. Mr.V.Gopinath, the learned senior counsel appearing for A.7/appellant in Crl.A.No.121 of 1993 would contend, that A.7, being the leader of a political party, many people would have called him through phone, which alone is insufficient to prove the conspiracy, as if he is also involved in the crime; that there is no evidence that A.7 was contacted by A.4 to A.6 or A.9 to A.11 or vis-a-vis and this being the position, when there is no evidence, that these accused have contacted A.7, either in person or through phone, connecting A.7, as if he engaged the hirelings viz. A.9 to A.11, at the request of other accused, is not based on legal evidence and this being the position, by improper appreciation of the evidence, a conviction came to be slapped upon him, which should be erased, by allowing the appeal filed by him.

24. Mr.Gopalakrishna Lakshmanaraju, the learned counsel appearing for A.9 to A.11/appellants in Crl.A.No.375/2003, would contend that the oral evidence of P.Ws.14 to 16, as if they have seen these accused, at the time of the incident, cannot be accepted, since the witnesses have not been examined forthwith; that in the evidence available, there are inconsistencies; that even as per their evidence, the scene of crime is also shifted; that the

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confession and recovery are all make believe affairs. In support of the above submissions, the learned counsel, taking us through the oral evidence of P.Ws.14 to 16 as well as the investigation part, as if the investigation is stained or tainted one, would urge that for the murder of Vivek, A.9 to A.11 cannot be held responsible, which was not properly appreciated by the trial Court, requiring interference by this Court, to set aside the same.

25. Mr.K.Asokan, learned Senior Counsel appearing for A.8/appellant in Crl.A.No.379 of 2003, would submit that there is no connecting material, implicating A.8, either in the conspiracy or his participation in the crime, along with A.9 to A.11; that the so-called arrest of A.8 is an impossible one, since the evidence would disclose that A.6 would not have shown A.8 in the lodge at Udumalpet, the fact being that there was no evidence how and under what circumstances, A.8 came to Udumalpet, after he reached Tirunelveli and after handing over the vehicle to its owner and this being the position, convicting this accused, under Section 120-B and 302 r/w.109 IPC, is not based on legal evidence. It is the further submission of the learned senior counsel for A.8 that he being the taxi driver, assuming that he took A.9 to A.11, unless it is shown, that he knew the conspiracy hatched between A.2 and A.4 to A.7 with A.9 to A.11, he cannot be held responsible for the offence and if at all, maximum, it could be said, he facilitated the offence in a way, taking the accused, for which neither Section 120-B IPC nor Section 302 read with any other offence could be slapped upon him. It is the further submission of the learned senior counsel, that the alleged recovery of the car and other materials, also would not support the case of the prosecution and if at all, the assailants would have left the same in the car, for which A.8 cannot be held responsible. Thus submitting, the learned senior counsel took us through the relevant portion of the evidence, especially the arrest part, leading to recovery, showing and demonstrating how the alleged arrest of A.8 cannot be believed.

26. We have heard Mr.L.Nageswara Rao, the learned senior counsel appearing for the State on the above points. The learned senior counsel, taking us elaborately through the evidence of prosecution witnesses and the effective investigation conducted by P.W.56 urged that under the facts and circumstances, there cannot be any better investigation, than the investigation conducted by the Investigating Officer, which connected each and every event, connecting the acts as well as the accused, proving the case starting to end, including the accomplishment of the conspiracy i.e. the result of the murder of Vivek. Thus supporting the entire reasonings, assigned by the learned trial Judge, the learned senior counsel made a submission for the dismissal of the appeals preferred by the accused, confirming the conviction and sentence of the accused.

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27. Before stepping into the facts of the case, we feel it is necessary to extract certain observations made by the Apex Court in INDER SINGH AND ANOTHER vs. STATE (DELHI ADMINISTRATION) (AIR 1978 SC 1091), which would indicate, to some extent, the duty of the Court and how the evidence should be assessed. Justice V.R.Krishna Iyer, while delivering the judgment, has held:

> "Credibility of testimony, oral circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. While it is necessary that proof beyond reasonable doubt should be adduced in all criminal cases, it is not necessary that it should be perfect. If a case is proved too perfectly, it is argued that it is artificial; if a case has some flaws, inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty men must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot get away with it because truth suffers some infirmity when projected through human processes. Judicial quest for perfect proof often accounted for police presentation of fool-proof concoction. Why fake up? Because the court asks for manufacture to make truth look true? No, we must be realistic."

28. In STATE OF PUNJAB vs. KARNAIL SINGH (2003 (5) Supreme 508), reiterating the earlier decision of the Apex Court, it is observed in paragraph No.12:

> "Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice according to law. {See: Gurbachan Singh V. Satpal Singh and Others (AIR 1990 SC 209)] Prosecution is not required to meet any and every hypothesis put forward by the accused. [See: State of U.P. V. Ashok Kumar Srivastava (AIR 1992 SC 840] A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial; if a case has some flaws inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a

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fetish. [see Inder Singh and Anr. V. State (Delhi Admn.) (AIR 1978 SC 1091) Vague hunches cannot take place of judicial evaluation. "A judge does not preside over a criminal trial, merely to see that no innocent man is punished. A judge also presides to se that a guilty man does not escape. Both are public duties" (Per Viscount Simon in Stirland V. Director of Public Prosecution (1944 AC (PC) 315) quoted in State of U.P. V. Anil Singh (AIR 1988 SC 1998). Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. (See: Shivaji Sahebrao Bobade & Anr. V. State of Maharashtra (1974 (1) SCR 489), State of U.P. V. Krishna Gopal and Anr. (AIR 1988 SC 2154), and Gangadhar Behera and Ors. V. State of Orissa (2002 (7) Supreme 276)."

Having the above principle and reminded duty in mind, we should approach this case not to find out the loopholes, if any, for the purpose of giving the benefit of doubt to the accused, whereas our aim should be to find out if there is acceptable evidence, warranting conviction since it is the duty of the Judge also as public duty, as observed by the Apex Court, to see that guilty man does not escape.

29. As far as the appeal against acquittal of A.3, i.e. Crl.A.No.1239 of 2004, is concerned, the learned senior counsel Mr.L.Nageswara Rao, appearing for the State, has not made any serious submission, for reversing the finding of the acquittal, compelling us to take a different view than the acquittal and in this view, it may not be necessary for us to go in detail, about the acquittal of A.3 by the trial Court. As far as A.3 is concerned, who is the driver of A.1, he is bound to take his master, wherever the master goes or directs him to take.

30. By scanning the entire materials also, we are unable to find anything incriminating against A.3, as rightly observed and recorded by the trial Court, to implicate A.3 with the crime. It is not the case of the prosecution that A.3 had played any role, either at the initial stage of conspiracy or at any stage of the conspiracy or at any stage of its execution, knowingly or unknowingly, in order to reach the destination. A feeble attempt was made, as if A.1 to A.3 were seen together near the scene of crime previously while they were discussing something, which alone cannot be the cause or reason, that A.3 also contributed anything, in the accomplishment of conspiracy. Because of these reasons alone, the learned senior counsel appearing for the State/appellant in Crl.A.No.1239 of 2004, has not advanced any argument for the conviction of A.3 and in this view, this appeal should fail, confirming the judgment of the trial Court, viz. the acquittal of A.3.

31. By exhibiting and exposing the muscle power, by the hirelings, who thrive by committing heinous crimes, for payment or

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otherwise, by spine-chilling vandalism in the industrial city of Coimbatore, in a posh area called R.S.Puram, Diwan Bahadur Road, near 'Richy-Rich' Restaurant, the husband of P.W.3, by name Vivek, was murdered, daringly at about 10.15 a.m. on 17.8.1993, when there was movements of public, vehicles, etc., as if no one could challenge them or no one could lay his hand upon the assailants or the person behind them. When the matter was reported, by registering a case, on receipt of the complaint-Ex.P.102, from one Valliyappan, the Manager of the Finance Company run by the deceased, the law was set on motion. The Investigating Officer, viz. P.W.56, rushing to the spot, not wasting any time, after conducting preliminary investigation, such as inquest, observation, preparation of sketch etc., had requested, under Ex.P.76, the Doctor to conduct autopsy, over the body of Vivek, in order to ascertain the actual cause of death of Vivek, medically, in order to find out, whether the death was caused due to homicidal violence or otherwise.

32. Pursuant to Ex.P.76, P.W.51 conducted autopsy over the body of Vivek on 17.8.1993 at about 2.00 p.m., upon identification of the body, by the police. The Post Mortem disclosed the following external injuries:

> "1.Horizontal cut injury seen from the top of right shoulder to the root of the neck up to the 4th cervical vertebra 33 x 12 cm. bone deep. Tip of the lateral end of the clavicle is sliced along the line of the injury. The soft tissues of the neck are severed in the direction of the injury. 4th cervical vertebra is also cut in its middle with severance of the spinal cord. The injury is directed latero medially margins are uniformly regular. Floor of the injury contained blood clots.
> 2. An oblique cut injury extending from the middle of the chin to the Rt. lateral aspect of the neck 20 x 3 cm. muscle deep. The soft tissues and the blood vessels are severed.
> 3. Horizontal cut injury 12 x 3 cm. bone deep from the middle of right cheek to the right lateral aspect of the neck with tailing in the neck. The wound is 4 cm. below the right ear.
> 4. Oblique cut injury 4 x 2 cm. bone deep in the right sub occipital region of the head.
> 5. Oblique cut injury 12 x 2 cm. bone deep tailed off in cuts lower end seen 1 cm. above the injury No.4 and parallel to it.
> 6. Oblique cut injury 9 x 2 cm. bone deep in the right half of the occipital region of head to the right mastoid region behind the right ear. The underlying bone is also cut along the line of the injury for 8 cm.
> 7. Oblique cut injury 11 x 2 cm. bone deep from the verte to the left parallel region with a cut in the underlying bone.
> 8. Horizontal cut injury directed lateral to medial from

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the upper most of the chin just below the lower lip right side running along the upper border of the mandible left side cutting through the soft tissues and right central and lateral incisor teeth of lower jaw along with left central lateral incisor teeth and canine teeth and the upper border of the mandible. The above mentioned teeth are found broken. The wound is 10 x 1 cm. bone deep. The margins of all the above injuries are uniformly regular and are all antemortem in nature."

The Post Mortem revealed that the assault was so intensive, not giving any chance, for the deceased, to escape from the death. The Doctor, examining the above said external injuries, as well as the corresponding internal injuries, was of the opinion, that the deceased would appear to have died of hemorrhage as a result of multiple cut injuries, of which external injuries No.1 and 2 and the corresponding internal injuries are essentially fatal. The Doctor, also on seeing the weapon-M.O.1 viz. Veechu Aruval, opined that the above said external injuries would have been caused with a weapon like M.O.1, that too, when the deceased was attacked from behind. The evidence given by the Doctor, though subjected to cross-examination, nothing was elicited from him, to say otherwise that the deceased would not have died due to homicidal violence. In fact, the death of Vivek, merciless brutal attack on him, causing several cut injuries, which had terminated his life instantaneously, are not challenged by any of the learned counsel, appearing for the accused, even suggesting any other cause of death, so as to take away the case, from the circle of homicidal violence. Thus, in view of the proved fact, accepting the oral evidence of the Doctor-P.W.51 and the Post-Mortem Certificate-Ex.P.77, we would conclude that Vivek, met his end of life, prematurely, at the hands of terminators, violently, and that act comes only within the meaning of 'murder'. Thus concluding, we have to see, by whom and what for this murder has been committed.

33. In short, the case of the prosecution is, that A.1 contacted his office-boy A.2, who in turn contacted A.4 to A.6, who in turn had made arrangement with A.7, who in turn arranged A.9 to A.11, to commit the murder of Vivek, who have utilised or hired the taxi service of A.8. A.8 to A.11 belong to Palayamkottai/Tirunelveli and they have no axe to grind against Vivek and in fact, they have no other avocation also, as disclosed by the evidence, at Coimbatore. This being the position, as established, which we will discuss infra, it is the case of the prosecution that A.9 to A.11 came to Coimbatore only for the specific purpose of the assignment, given to them, to murder Vivek and in fact, they have accomplished the same, in terminating the life of Vivek, thereby giving the hope to A.1, to marry P.W.3, if possible. Before going into the part of conspiracy, now, let us take the actual assault, who had assaulted Vivek and to prove the same, what are the materials produced by the prosecution, whether

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those materials are proof sufficient to fix the culpability upon the actual assailants, as claimed by the prosecution, viz. A.9 to A.11.

34. To set the law into motion, Ex.P.102 complaint was given by one Valliyappan, Manager, Nayagam Finance and Nayagam and Co., on 17.8.1993, on which basis, a case came to be registered at 11.00 a.m., for which, without delay, Ex.P.103 printed FIR was prepared and submitted to the Judicial Magistrate No.1, Coimbatore, along with Ex.P.102. In Ex.P.102, neither the accused nor the witnesses were named. The complainant viz. Valliyappan, admittedly, has not seen the actual incident or assault whereas he came to know the same only through the Watchman working in 'Prithvi Jewellers', who has been examined as P.W.16. Admittedly, the Inspector of Police, who moved the law into motion, has not obtained any statement, at the first instance, from P.W.16 that is before registering the case. Under the charged atmosphere, where the owner of a finance company was murdered, in the busiest place of Coimbatore, it might not have been possible for the Inspector of Police, at that time, to obtain a statement, before registering the case. When the incident was reported, whether on the basis of the hearsay or otherwise, he recorded the statement of the Manager, as reported, and registered a case, then took the investigation, in which we are unable to find any illegality or irregularity, that too, affecting the case of the prosecution. In this view, the fact, from P.W.16 no statement was recorded for registering the case, fails to create any doubt.

35. In Ex.P.102, though the assailants were not named, the number of persons participated was indicated, since it says, one person has assaulted Vivek, whereas two were present at the time of the incident, thereby indicating, in the assault or in murdering Vivek, three persons should have been involved. Ex.P.102 further reads that the assailants have escaped from the scene of crime, which was witnessed by many persons. As stated above, the incident had taken place at 10.15 a.m., the busiest part of the day, that too in the busiest locality of the industrial city-Coimbatore i.e. R.S.Puram. Therefore, certainly, many persons would have witnessed the incident, whether they have come on their own to give evidence or not. The trend of the public, including the so-called educated public or elite, is to evade from being cited as a witness, in order to escape from the ordeal, which they have to face, while coming to the Court. In this view, many persons have not come as witnesses, though they might have seen the incident, which certainly, will not spread any cloud of doubt upon the case of the prosecution, to doubt about the evidence given by the eye-witnesses, though some of them have been examined later.

36. The submission of Mr.Gopalakrishna Lakshmana Raju, learned counsel appearing for A.9 to A.11, that the prosecution has failed to prove the actual scene of crime, in our considered opinion, is an imagination, probably to create some doubt, thereby to make some crack, in the prosecution case, if possible allowing the accused to

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escape, for which we are unable to help, because of the concrete materials available to prove the place of incident. Near the scene of crime, there is a showroom 'Titan Watch' company. It appears, in the same street or elsewhere, there is a Titan Watch Shop. The eye-witnesses have deposed, while referring the watch-shop, as Titan Watch Shop, not exactly mentioning it as Titan Showroom. Further, some contradictions also were brought to surface, regarding the location of some shops, autorickshaw stand etc. On that basis, a faint attempt was made by the learned counsel for A.9 to A.11, to shift the scene of crime, thereby to belie the oral evidence of P.Ws.14 to 16. It is an admitted fact that the incident or the assault had taken place near a restaurant called 'Richy-Rich', situated in Diwan Bahadur Road, that cannot be changed. The observation mahazar, prepared by the Investigating Officer, not under challenge, as well as the sketch prepared by him, would disclose that the incident had taken place, only near the restaurant called 'Richy-Rich' and just in front of that restaurant, at some distance, there is Titan showroom also. In the colloquial term, ordinary people used to refer, without knowing the significance of showroom and retail shop, as if they are one and the same, mentioning Titan watch shop, which cannot be magnified, to doubt about the oral testimony, given by P.Ws.14 to 16 or any one of the eye-witnesses, in this regard.

37. The incident had taken place on 17.8.1993 at about 10.15 a.m., during broad day light. The eye-witnesses have been examined in the Court on 2.5.2002 i.e. nearly nine years thereafter. The running of time, certainly, would have eroded the memory, to some extent, despite a chance to refresh the memory, even assuming. In this view, when ordinary people like land broker, fruit vendor and the auto-rickshaw driver give evidence, certainly, there bound to be some contradictions or omissions, as the case may be, which need not be taken so seriously, if their evidence is otherwise dependable, inspiringly acceptable. Further, if any deviation noticed from 161 Cr.P.C. Statement, that cannot be dubbed as improvement made with a sinister motive as ruled by the Apex Court in CHANDRASEKAR SURESHCHANDARA BHATT AND OTHERS vs. STATE OF MAHARASTRA (2001 SCC (Crl.) 1504). In this view, we are inclined to ignore the contradictions, said to be available in the oral evidence of P.Ws.14 to 16, since, in our considered opinion, the contradictions had no effect of erasing the evidentiary value of these witnesses, in fixing the culpability upon the accused.

38. As spoken to by P.W.56, searching and securing the eye-witnesses, P.W.14 was examined on 20.8.1993 and P.W.15 was examined on 1.9.1993 whereas P.W.16 was examined on the same day of occurrence i.e. On 17.8.1993 and their statements were recorded, under Section 161 Cr.P.C., thereby showing some delay in the examination of P.Ws.14 and 15 alone by the Investigating Officer. P.W.14 has given explanation, for his absence or not coming to that area for three or four days. According to him, frightened by the

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incident, he has not come to the scene of crime or nearby, which appears to be reasonable and acceptable, considering the gruesome nature of the incident, which took place in broad day light, in a busy locality. P.W.15 also would state, that after the incident, taking the auto, he went away from that place and returned only after 15 days or so. There is no material, when the Investigating Officer reached the scene of crime, somebody informed about the above said eye-witnesses or their presence and despite they have not been examined. As said above, it is not the case of the complainant also, in Ex.P.102, specifically mentioning the names, that these people have seen the incident. Under the above facts and circumstances of the case, in our considered opinion, the non-examination of the eye-witnesses, forthwith or the examination of the witnesses at a later point of time, certainly, will not eclipse their evidence or it may not have the effect of spreading any cloud of doubt, to doubt their presence or to entertain any spontaneous doubt about the genuineness of the evidence, given by them.

39. Thiru Ramalingam-P.W.16, when cross-examined by A.4 to A.6 has stated:

"*என்னை தவிர போலீசார், புரோக்கர், ஆட்டோ டிரைவரை விசாரித்தார்கள். ஆட்டோ டிரைவர் சாட்சி சொல்லி போனவர் தான். சாட்சி சொல்லிவிட்டு போன ப ுரோக்கரையும் விசாரித்தார்கள்.*"

thereby meaning, "besides me, police examined the broker and an auto driver. The persons who have given evidence are the auto driver and broker". P.W.16 was examined by the Investigating Officer on 17.8.1993 itself i.e. at the time of the inquest or subsequent to the inquest. Since the above said evidence would suggest, according to the learned counsel for A.9 to A.11, that P.Ws.14 and 15 also might have been examined on the same day, if so, the statements of P.Ws.14 and 15 recorded under Section 161 Cr.P.C. should also reflect that they have been examined on the same day, which is not the case, admittedly, since P.Ws.14 and 15 have not been examined on the same day viz. on 17.8.1993. In this view, the learned counsel for A.9 to A.11 would contend, that the evidence given by P.Ws.14 and 15 must be false, on the basis of the evidence given by P.W.16 and therefore, accepting the oral testimony of this kind of witnesses, is not safe. As an answer to the above said submission, Mr.Nageswararao, the learned senior counsel appearing for the State, would contend, that the evidence given by P.W.16, as above, is not to the effect, that P.Ws.14 and 15 have been examined on the same day (17.8.1993), whereas it is the general statement, since P.W.16 might have had knowledge, about the examination of P.Ws.14 and 15 at a later point of time, and when the question was put to him, without reference to time, as to who are all the witnesses examined, he has stated, that besides him, an auto driver and broker have been examined, which will not mean, that those witnesses were also examined on the same day. The submission of the learned senior counsel for the State appears to be convincing, well acceptable also, considering the context, under which the question was put to P.W.16. Generally, P.W.16 was examined about the

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examination of the witnesses, not with reference to the date or the incident or pointing out the date of incident. Therefore, P.W.16, when cross-examined by the learned counsel for the defence as to who are all the other witnesses examined, he might have told, that a land broker and an auto driver were also examined, because of the fact, he might have known this at a later point of time. In this view of the matter, we are of the considered opinion, that the above said answer elicited from P.W.16, is ineffective of erasing the evidence given by P.Ws.14 and 15 or ineffective, even to doubt about the investigation so to say the investigation, is tainted, as claimed by the defence, not based on any material.

40. P.Ws.14 to 16 are the residents of nearby areas of Coimbatore whereas A.9 to A.11 are the residents of Palayamkottai, which is separated by roughly 400 kms. or so. Admittedly, there is no enmity of any kind, even suggestively, between the accused and P.Ws.14 to 16. An usual and casual suggestion thrown to these witnesses, as if these witnesses are giving evidence, in order to oblige the police, apprehending fear, fails to convince us. Under the above facts and circumstances of the case, we are inclined to accept the oral evidence of P.Ws.14 to 16.

41. The very fact, that there is no enmity between P.Ws.14 to 16 and the accused, will not, automatically, lead to the inference, that whatever these witnesses have said must be true and it should be acted upon. On the other hand, if the oral evidence of P.Ws.14 to 16 is quite natural, in tune with the probabilities, supported by other attending circumstances, for which there is no explanation, it is the duty of the Court, to accept their oral testimony and act upon them, in order to fix the culpability of the accused. In this view, we have to scan and weigh the oral evidence of P.Ws.14 to 16.

42. It is an admitted position that P.Ws.14 to 16 are not known to the accused, vice versa. The law is well settled, that if a witness points out the accused, for the first time, in the box, that should be considered as a doubtful one, and in this view alone, to avoid the comment, Test Identification Parade is contemplated. True, and we are also conscious of the fact that the identification of the accused by the witnesses in the Test Identification Parade, before a Judicial Magistrate, alone, cannot be the substantial evidence to rope-in the person, when the witness gives evidence, pointing the accused, while he was in the box also. Only in order to corroborate the fact, whether the witness would have seen the accused, at the time of the incident, whether he could identify the said person, when the Test Identification Parade was conducted, this kind of procedure is contemplated, aiding the prosecution to fix the accused, as relevant, as said in Section 9 of the Indian Evidence Act, then, enabling the prosecution to collect the evidence also.

43. The Investigating Officer, after the apprehension of the accused-A.9 to A.11, on their surrender or otherwise, requested the

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judicial forum, to conduct Test Identification Parade, which was ordered, as spoken to by P.W.54. Thiru Rajasekaran-P.W.54 was working as Judicial Magistrate No.2, Coimbatore, between 1991-1995. As directed by the Chief Judicial Magistrate, at the request of the Investigating Officer, he conducted Test Identification Parade twice, at the first instance, in order to identify A.10 and A.11 and at the second time, in order to identify A.9. As per the report-Ex.P.84 and as spoken to by P.W.54, P.Ws.14 to 16 have identified A.10 and A.11 correctly in the Test Identification Parade. In the same way, when the second Test Identification Parade was conducted, for fixing, whether A.9 is the accused participated in the incident, P.Ws.14 and 16 have properly identified A.9, whereas, it seems, P.W.15 has not identified A.9. The proceeding for the second Test Identification Parade is Ex.P.85.

44. By going through the oral evidence of P.W.54, we are unable to find out any irregularity or infirmity, in conducting the Test Identification Parade. The submission of the learned counsel for the accused-A.9 to A.11, that these accused were shown to the witnesses, previously or their photographs were shown to the witnesses before the Test Identification Parade, failed to inspire us, in the absence of any buttressing material. It is not shown by sufficient material, that the photographs of these accused were published, immediately after the incident or immediately after the arrest or their surrender, in any newspaper or the witnesses were taken to the jail or the police station, as the case may be, where A.9 to A.11 were lodged. Therefore, rejecting the submission, made by the learned counsel for A9 to A.11, as not supported, we are unable to say, that P.Ws.14 to 16 would have identified A.9 and A.10 and A.11, not on the basis of their seeing at the time of the incident, but only on the basis of their seeing them, either in jail or seeing their photographs, as the case may be. Under the above facts and circumstances, we should hold, that P.Ws.14 to 16 had identified A.10 and A.11 and P.Ws.14 and 16 had identified A.9, only because of the fact, that they have seen them, at the time of the incident and not otherwise. In this view also, the oral evidence, given by P.Ws.14 to 16, should have their credit, being acceptable in nature.

45. The argument that the evidence of identification is a weak type of evidence, is repelled by the Apex Court, in STATE OF UTTAR PRADESH vs. BOOTA SINGH AND OTHERS (1979 SCC (Cri) 115) stating "we also disapprove the universal rule of application laid down by the High Court that the evidence of identification is a weak type of evidence." It is also held:

> "Where the witness correctly identifies the accused at a T.I. Parade held by a Magistrate after observing all the essential formalities and taking the necessary precautions and then identifies the accused also in Court, the evidence of identification can be believed unless the evidence of witness suffers from some other infirmity.

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> Moreover, the evidence of identification becomes stronger if the witness has an opportunity of seeing the accused not for a few minutes but for some length of time, in broad day light, when he would be able to note the features of the accused more carefully than on seeing the accused in a dark night for a few minutes."

In the case on hand, the incident took place during broad day light, exposing the assailants to the eye-witnesses, where they had full opportunity to see the accused, their acts etc. In the Test Identification Parade conducted by P.W.54 Magistrate, no infirmity has been pointed out, to doubt about the same. Under the above said facts and circumstances, as observed by the Apex Court also, the evidence of Test Identification Parade becomes stronger.

46. The Investigating Officer, who reached the scene of crime immediately, preserving the scene intact, after registration of the case, inspected and prepared observation mahazar, in the presence of P.W.37 and the observation mahazar is Ex.P.40. In the observation mahazar-Ex.P.40, it is observed that at a distance of 10 ft. from the body, there was one pair of leather chappal-M.O.7 of 9" size. P.W.37, who was present at the time of the inspection and at the time of preparation of Ex.P.40, being the signatory to the document, had stated that from the scene of crime, police have recovered one pair of brown colour chappal, identifying M.O.7, which is the case of the Investigating Officer also. M.O.7, along with other material objects viz. M.Os.2 to 6 were recovered under Ex.P.41, which is not very much challenged before the Court, in the sense that the preparation of Ex.P.41, as well as the recovery of M.O.7.

47. The eye-witnesses have accounted, that one of the assailants, while taking heels from the scene of crime, had left his pair of chappal. It is the case of the prosecution that chappal (M.O.7) belong to Pavunraj-A.10, as revealed by the investigation. To substantiate the same, aid is sought, from the oral evidence of P.Ws.50 and 55 and the report of the Footprint Expert, which is exhibited as Ex.P.73. At the request of the Investigating Officer, P.W.55-the then Judicial Magistrate No.1, Coimbatore, obtained the footprints of Pavunraj @ Pavun-A.10 under Ex.P.87, Prince Kumar @ Prince @ Balan-A.11 under Ex.P.88, and that of Kumar-A.9 under Ex.P.99. The corresponding proceedings are marked as Exs.P.89 and 100. The above footprints were compared by P.W.50, with the footprints or impressions available in M.O.7 chappal for left foot as well as right foot. As seen from Ex.P.73 and as spoken to by P.W.50, left foot impression on the insole of the leather chappal was marked as Item No.3 and the right footprint on the insole of the leather chappal was marked as Item No.4. While comparing these two foot impressions, on the insoles of left and right chappal, the expert had marked the left and right leg palm prints of Pavunraj-A.10 as Item Nos.5 and 6 respectively; and the right foot prints of Kumar-A.9 were marked as Items No.9 and 10, whereas his left foot

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prints were marked as Items No.11 and 12 and the left and footprints of Prince Kumar @ Prince @ Balan-A.11 were marked as Items No.7 and 8 respectively. Comparing the characteristics of impressions, the Scientific Officer was of the opinion, that the left foot impression on the insole of the leather chappal-Item No.3 and the left foot impression in Item No.5 (taken from A.10 Pavunraj) belong to one and the same left foot and that the right foot impression on the insole of the leather chappal in Item No.4 and the right footprint impression in Item No.6 (taken from A.10 Pavunraj) belonged to one and the same right foot, thereby showing that M.O.7, recovered from the scene of crime, must be one left by Pavunraj i.e. A.10, thereby, in a way, probablising, though it is not substantive evidence, that A.10 might have been in the scene of crime, while assaulting Vivek. This evidence, if corroborated by the eye-witnesses, then, there is a duty cast upon A.10 to explain, how his chappal came to the scene of crime and recovered, failure will lead to an inference, that he should have been present in the scene of crime, pursuant to the conspiracy, followed by the actual attack, on that date.

48. Thiru Ranjith Check-P.W.50, who compared the footprints or the impressions of the accused with M.O.7 has catalogued the reasons for his opinion. Though elaborate cross-examination was done by A.9 to A.11, as seen from the answers elicited, we find no answer, to doubt about the opinion or to take any different or possible some other opinion. By producing any text also, no argument was advanced before us, how the comparison of the footprint or the impression, as the case may be, is not scientifically dependable, even creating any doubt. In view of the fact, that the footprints were taken in the presence of the Judicial Officer, which were compared by P.W.50, with the impressions found in the chappal recovered from the scene of crime, we are of the considered opinion, that the opinion of P.W.50 viz. Ex.P.73, should have its credence, at least in probablising the case of the prosecution, though it is an opinion evidence, not coming within the meaning of substantial evidence. This opinion, if helpful to buttress the substantive evidence given by the eye-witnesses, identifying A.10 as well as stating about the leaving of the chappal, by one of the assailants, then, there is nothing wrong, in our considered opinion, to rely upon the oral evidence of P.W.50, as well as the report given by him in Ex.P.73. In the light of the above discussion, we are constrained to accept the oral evidence of P.W.50 and Ex.P.73, in order to see whether A.10 would have participated in the assault, which we will discuss, in detail, infra.

49. In obedience to the command of Section 313 Cr.P.C., A.10 was examined, bringing to his notice about the comparison of footprints or impressions available in M.O.7 with that of his footprints - left and right- which are marked as Items 5 and 6, by P.W.50, as indicated in Ex.P.73. The opinion of the expert, that the impression found in Item No.3 and 4 viz. chappals are similar to the footprints in Items 5 and 6, which belong to A.10, was also

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brought to the knowledge of A.10, during his examination under Section 313 Cr.P.C. Despite the fact, he has not given any explanation, except exhibiting his ignorance, thereby showing, no explanation was offered and in this view, this failure should be taken into consideration, while assessing the oral evidence of P.Ws.14 to 16.

50. P.W.14 is the broker, who deals in real estate. According to him, in connection with his real estate business, he used to assemble, before the Titan Watch shop, D.B.Road, every day, between 9.00 and 11.00 a.m. It is the further evidence of P.W.14 that Vivek was known to him, since he is having his finance office at M.R.Complex. The 'Titan Watch Shop', mentioned by P.W.14, must be with reference to Item No.29, shown in Ex.P.104-sketch, as 'Titan Watch House' in the colloquial language. As submitted by the learned counsel for A.9 to A.11, that there is some other Titan Watch shop, will not be the ground to shift P.W.14 from 'Titan Watch House' to 'Titan Watch Shop'. The 'Titan Watch House' is just about 40 ft. or so from the scene of crime towards South-West and from there one could see, distinctly, the incident, which had taken place near 'Richy-Richy Ice Cream', marked as Item No.14 in Ex.P.104 sketch. Just on the Northern side of this shop, before the junction of Lokamanya Street and D.B.Road, the incident is shown to have taken place. Only to remove P.W.14 from the nearby scene of crime to elsewhere, an attempt was made by the learned counsel, to shift the scene of crime, which is not possible, in view of the fixed place of 'Richy-Rich Ice Cream', near which the incident had admittedly taken place, whoever may be the cause for the incident.

51. P.W.14, being the regular person, in coming to D.B.Road, certainly, would have seen the incident, which had taken place at 10.15 a.m. He was examined on 20.8.1993 by the Investigating Officer, at the first instance, and the delay, for his examination, was also explained by the Investigating Officer, which is supported by the oral evidence of P.W.14, as indicated by us supra. P.W.14 would state, that as usual, on the date of the incident, Vivek came to his office, in the red colour Maruthi car, stopping the car near 'Richy-Rich shop' he alighted, then proceeded to his office, having the handbag also. It is further stated by P.W.14, that when Vivek crossed 'Richy-Rich', A.10 and A.11 restrained him, followed by the assault or cutting by A.9, from behind, over the neck of Vivek, which made him to fall immediately. Medical opinion is also, that the deceased should have been assaulted from the backside, which is in conformity with the evidence given by P.W.14. P.W.14 further would state that after Vivek fell down, A.9 cut him thrice, and thereafter, all the three accused flew away from the scene of crime, towards East via Lokamanya Street.

52. It is the further evidence of P.W.14, that while running away from the scene of crime, one of the assailants left his chappal and the chappal was identified as M.O.7, which was recovered from

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the scene of crime, by the Investigating Officer, as indicated above. The suggestion thrown to P.W.14, casually, not supported by any other materials, that he was examined for the purpose of this case, belatedly, elsewhere in the month of May, 1994, may not be correct, in view of the fact, that the Investigating Officer has asserted that he had examined Selvaraj (P.W.14) and recorded his statement on 20.8.1993 itself. Apart from the above said suggestion to P.W.14, nothing is elicited, to discard his oral testimony, as unworthy of credence or to conclude that he should have been brought, for the occasion, by the police. P.W.14 identified A.10 and A.11 at the first Test Identification and he had also identified A.9, in the second Test Identification, in the presence of the Judicial Magistrate, which we have already pointed out.

53. It was suggested to P.W.14, as if the accused Nos.10 and 11 were shown to him, in the Court premises and on that basis alone, he was able to identify the two, when the Judicial Magistrate had conducted the Test Identification Parade. If it is to be accepted, at least, the defence should have shown, that A.10 and A.11 were brought to the Court, as remand prisoners, on a particular day and on that day, P.W.14 was also available with the police, so as to say, the police should have pointed out A.10 and A.11, as if the assailants, to be identified by P.W.14, later. Since that kind of materials are not available, it is not possible to believe the suggestion thrown to P.W.14, even to entertain a doubt. In this view of the matter, we do not find any reason, to eschew the convincing and impressive oral evidence of P.W.14, who has no motive at all against the accused, to depose, or who has no chance to lean towards police, to support their case, since their support is not necessary, generally, for doing his business. It is not even suggested to him that he is involved in any other criminal case or any dispute touching the immovable properties, which he dealt with, thereby he requires the help of the police, so as to oblige them, came to the Court, to speak something, which he had not seen. In the absence of any such defence and on the basis of the convincing evidence, given by P.W.14, which is very very natural, impressive and inspiring, we are inclined to accept the oral evidence of P.W.14, which proves the actual involvement of A.9 to A.11, in assaulting Vivek on 17.8.1993 at about 10.15 a.m.

54. It is the usual practice of any auto driver, to park the auto near junction of the roads, to have the customers. P.W.15 being the auto driver, would state that on the date of the incident, parking his auto near Lokamanya Street at about 10.15 a.m., he went to the corner of Lokamanya street, where it joins D.B.Road, in order to purchase a cigarette, from a bunk. He has further stated, that just 30 ft. ahead of him, Vivek was proceeding and all of a sudden, A.10 and A.11 came there, prevented Vivek. He has further stated, that the man, who was behind Vivek, cut him repeatedly, identifying A.9, in the Court as the person, who cut Vivek. He has further deposed, that by the cut, inflicted by A.9, Vivek sustained severe

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cut injuries over his neck and while the accused were running towards East, through Lokamanya Street, he has also seen a pair of chappal at the scene of crime. He has further stated, that he had seen two house brokers also (probably meaning P.W.14) near Titan Watch Shop, as well as the watchman and other people. P.W.15, leaving the place, thereafter returned to the stand, according to him, after fifteen days or so, and that is why, he was examined by the Investigating Officer on 1.9.1993, in which we are unable to see, any unreasonableness or any motive to fix him as an eye-witness.

55. P.W.15, though, at the first instance, had stated that A.9 had actually cut the deceased, then, doubted and that is why, he was not certain about the actual person who cut the Vivek, for which he has also given reasons. According to him, he had seen the assailant, from the side angle and that is why, it was not possible for him, to identify the actual assailant, properly. In this view alone, he has not identified A.9, before the Judicial Magistrate. In view of the fact, P.W.15 has not identified A.9 correctly before the Judicial Magistrate, at the time of Test Identification Parade, and as well as the statement given by him before the Investigating Officer, as admitted, a submission was made by the learned counsel for A.9 that believing his oral evidence, slapping conviction or confirming the conviction against A.9, may not be proper. If P.W.15 alone is the witness, to speak about the incident, then the submission, made by the learned counsel for A.9, may be acceptable, to certain extent, which is not available here, because of the reason P.Ws.14 and 16 have correctly identified A.9 also, not only before the Judicial Magistrate at the time of Test Identification Parade, but also before the Court, when they were examined as witnesses. In this view of the matter, in our considered opinion, the doubtful identification of A.9, by P.W.15, certainly, would not eclipse the case of the prosecution or would not pave a way to A.9, to have a cakewalk, escaping from the clutches of law. By going through the cross-examination of this witness also, nothing is concretely brought to surface to disbelieve his oral evidence. As suggested to P.W.14, a suggestion was thrown to P.W.15 also, regarding the identification of accused, before the Judicial Magistrate, which deserves rejection, on the same reasons.

56. Thiru Ramalingam-P.W.16 was examined on the date of the incident by the Investigating Officer and his statement recorded under Section 161 Cr.P.C., also reached the Court on the same day. As deposed by the Investigating Officer, at the first instance, P.W.16 had given the statement, about the wrongful restraint of the deceased by two persons and the actual assault by one person, giving some kind of identification also, thereby indicating, he could identify the assailants, at a later point of time. In this way alone, he had identified A.9 to A.11 before the Judicial Magistrate, during Test Identification Parade. The reasons assigned by us, for accepting the oral evidence of P.Ws.14 and 15, are very well

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applicable, for accepting the oral evidence of this witness also.

57. P.W.16 claims that he was working as Watchman in 'Prithvi Jewellers', which is in the D.B.Road, on the North of scene of crime, situated on the western side. Since his statement was recorded on 17.8.1993, which had reached the Judicial Magistrate, having all the safeguard, on the same day, we do not find any reason to disbelieve his statement, regarding his employment in the 'Prithvi Jewellers', though an attempt was made by the accused to say, as if he was not employed there. P.W.16 would state, that on the date of the incident, at about 10 or 10.30 a.m., when he was in front of the jewellery shop, he had seen Vivek going to his office, after parking his vehicle near 'Richy-Rich Restaurant'. He has further stated, when Vivek was proceeding with a handbag, while A.10 and A.11 prevented him, A.9 cut Vivek from behind on the back side of the head, meaning near the neck. It is his further testimony that one of the accused, while running from the scene of crime, left his chappals which were recovered from the scene of crime, identified and exhibited as M.O.7. He has also further deposed that he alone informed this incident to Valliyappan, the Manager of the Finance Company, owned by Vivek and to that effect, there is reference in Ex.P.102-complaint given by Valliyappan, who is no more. In the earliest statement, which came to be recorded immediately after the assault, it is reported, that Watchman Ramalingam has reported the incident to the informant viz. Valliyappan. For these reasons, we find no difficulty at all in concluding, that P.W.16 should have witnessed the incident, and that is why, he immediately reported the matter to Valliyappan, who in turn, after verification, preferred the complaint to the police, as spoken to by the Investigating Officer-P.W.56.

58. If we read the oral evidence of P.W.16, coupled with Ex.P.102, as well as the fact that he was examined on the same day of occurrence and his statement was also submitted to the Court on the same day, certainly, there cannot be any reason or ground to ignore his oral testimony. Thus, even ignoring the oral testimony of P.Ws.14 and 15 (which cannot be the position), a conviction could be sustained, as far as A.9 to A.11 are concerned, since the oral evidence of P.W.16 is so impressive and natural. In our considered view, because of the fact, P.W.16 might have seen A.9 to A.11, he has also identified them before the Judicial Magistrate, during Test Identification Parade, despite their change of place and even dresses, while conducting Test Identification Parade as well before the Court. Thus, accepting the ocular evidence of P.Ws.14 to 16, coupled with the recovery of chappal-M.O.7, which, in a way, prove the presence of A.10 at the time of the incident, in the scene of crime, followed by other attending circumstances, which we would discuss infra also, the irresistible conclusion, that could be drawn by any Court, must be, that A.9 to A.11 alone should have committed the murder of Vivek and there cannot be any other person, excepting these three accused. The methodical investigation done by P.W.56,

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also takes us to the same conclusion, since we found, no stain, or tainted part in his investigation, in tracing these accused, being the real culprits.

59. As per the evidence of P.Ws.14 to 16, only A.9 had cut or inflicted cut injuries, to the deceased Vivek and it is not the case of the prosecution, that though A.10 and A.11 were also present, they have caused any injuries. On the above basis, Mr.Gopalakrishna Lakshmana Raju, the learned counsel for A.9 to A.11, would contend, that convicting A.10 and A.11 under Section 302 r/w.34 IPC is not at all possible and if at all, maximum, A.9 alone could be dealt with. In this context, we have to see, the scope of Section 34 IPC, as well as the role played by A.10 and A.11.

60. Section 34 of the Indian Penal Code, facilitate the Court, to punish a person, if it is shown that the act done was, by several persons in furtherance of common intention. A.10 and A.11, being the residents of Palayamkottai, had no occasion or necessity to be present at D.B.Road, Coimbatore, at the place of occurrence, if they have no common intention, to murder Vivek, along with A.9, who did the act precisely, as a professional killer. All the witnesses, who had witnessed the incident, would state, in a uniform voice, which cannot be termed as parrot like, that A.10 and A.11 prevented Vivek, thereby facilitating A.9, to cut Vivek from behind, which he did precisely, as exposed by convincing oral evidence. The above facts would indicate that A.10 and A.11, though had not actually caused any injuries to Vivek, they shared the common intention and the criminal act was done by all the persons, in furtherance of the common intention and this being the position, as mandated under Section 34 IPC, each of such persons is liable, for the act committed by A.9, in the same manner, as if the said act was done by these two accused also. The trial Court, considering the scope of Section 34 IPC, as well as the actual involvement of A.10 and A.11, in sharing the common intention, by contribution of their acts viz. preventing the deceased, has correctly come to the conclusion that A.9 should be punished under Section 302 IPC, while A.10 and A.11 should be punished under Section 302 r/w.34 IPC, in which, there can be no interference, since it is safeguarded by legal position, supported by facts.

61. On 23.10.1993, the Investigating Officer received information that A.9 surrendered before the Judicial Magistrate No.6, Madurai. Therefore, on application, the Investigating Officer-P.W.56, took custody of A.9 on 29.10.1993 and thereafter, A.9 was examined in the presence of Jayaraman-P.W.40 and T.P.Rajan and at that time, as spoken to by P.W.56, A.9 has given a confession statement (the admissible portion of which is marked as Ex.P.56), informing, that he will show the place of concealment of the weapon, assuring that he will take out the same, if he was taken to that place. Pursuant to the said confession of A.9, according to P.W.56, M.O.1 was recovered in the presence of P.W.41, under the cover of

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Ex.P.57-mahazar. When this weapon was shown to the Post-Mortem Doctor-P.W.51, he opined that the injuries, sustained by the deceased Vivek, would have been caused by using this kind of weapon-like M.O.1. P.Ws.14 and 16 also have identified this weapon, as the one used by A.9, to cut Vivek. The above established facts would suggest, very strongly, unerringly too, that because of the fact that P.Ws.14 and 16 had seen the weapon, while it was used by A.9, for assault, they had identified the same also before the Court, though it is after nine years or so. This is an added factor to re-affirm the above conclusion, about the assault of A.9, causing death of Vivek.

62. It is the specific case of the prosecution that the amount, which belonged to A.1, reached the hands of the terminators, for the accomplishment of conspiracy. To prove the above aspect, aid is sought from M.O.37 and Ex.P.114, as well as the cover in which M.O.37 was put in. The Investigating Officer-P.W.56 would state that on 16.9.1993, when Pavunraj (A.10) was examined by him; he had given a confession statement, in the presence of P.W.40 and another, in which the admissible portion is Ex.P.54 and thereafter, Prince Kumar (A.11) also gave a confession statement, in the presence of the same witnesses and the admissible portion is Ex.P.55. Recording of confession statements, of these accused, is also spoken by P.W.40. In the evidence of P.Ws.40 and 56, as far as the confessional statements, recorded from A.10 and A.11 are concerned, we are unable to find any reason to discard the same. Pursuant to Ex.P.55, according to P.W.56, from the house of A.11, in the presence of witnesses-Selvam and Amalraj, a sum of Rs.2,000/= (M.O.35) and a minor chain-weighing 12 gms. (M.O.36) were recovered, under the search list-Ex.P.113. It is the further evidence of P.W.56 that pursuant to Ex.P.54, Pavunraj (A.10) took them to his house at Kurichipalamalai wherefrom he took out a cover containing Rs.5,000/= and the photograph of A.7, which were recovered under the search list-Ex.P.114. Though Exs.P.113 and P.114 are labeled as Form-98, indicating as search lists, they were used only as mahazars, for the recovery of the properties. There is nothing wrong, on the part of the Investigating Officer, in using the form-98, while recovering the properties, as per the disclosure statements-Exs.P.54 and P.55. Therefore, the nomenclature for Exs.P.113 and P.114 viz. Search lists, will not, in any way, affect the recovery, which was pursuant to disclosure statements i.e. confessional statements. In this view of the matter, the submission of the learned counsel for the accused, that while searching the houses of A.10 and A.11, proper procedures were not followed and therefore, these documents are inadmissible, to prove the recovery, fails to inspire us. The very fact that the Investigating Officer has used Form-98, is not precluded, since it proved the fact, as seen from the disclosure statements as well as the oral evidence of P.W.56, that the properties were recovered only as per the disclosure statements, probably leading to the house and not actually making the actual search, as contemplated under the Cr.P.C.

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63. P.W.56 has given specific evidence, that M.Os.37 and 38 were kept in a cover, in which the name of "Vijayalakshmi Mills Limited" was printed. Ex.P.114 also would disclose that the photo and the cash were kept in a cover of 11" length and 9" breadth with printed words "Vijayalakshmi Mills Limited, Regd.Office: Kuniyamuthur, Coimbatore-641008", which was kept on the right side roof of the house. We do not find any reason to disbelieve the recovery. At present, though the cover is not produced for our perusal, as seen from the oral evidence of P.W.56, the said cover was also marked as Material Object, which could be seen from the Appendix of the judgment, which reads:

> "cash of Rs.5,000/= (Rs.50 x 100 notes, kept in the cover printed as "Vijayalakshmi Mills Limited".

Thus, the recovery of the cover, which belonged to A.1's company, by the disclosure statement, made by A.10, as well as the photograph of John Pandian (A.7), certainly, would disclose the connection of A.10 with A.7 as well as money should have emanated from Vijayalakshmi Mills, which must be the amount handed over by A.2 to the assailants, either directly or through A.4 or A.6, as the case may be. Though there is no direct evidence for the same, it should be inferred so, under the stated circumstances. Thus, the disclosure statement as well as the recovery also connects A.10 with the incident, in addition to the conspiracy part, which we will point out at the appropriate time. In the light of the above discussion, the irresistible conclusion, must be, that A.9 to A.11, who belong to Palayamkottai had come to Coimbatore and assaulted Vivek, causing his death.

64. It is to be remembered that A.9 to A.11 had no axe to grind, against Vivek and it is nobody's case, that these people have any animosity against Vivek. In this background, it is to be seen, why A.9 to A.11 had travelled all the way from Palayamkottai to Coimbatore and committed the murder of Vivek. It is the case of the prosecution that these three accused have been engaged by A.7, who was contacted by A.2 to A.6, at the instance of A.1, whether he had direct contact with A.4 to A.6 or not, A.1 had direct connection with A.2, being his office boy, who had some connection with A.4 to A.6. It is the further case of the prosecution, that A.1 had decided to finish-off, Vivek only for the purpose of reaching P.W.3, since he had originally failed in his love affair with her and not only that, he has also later met the failure in his attempted married life, with Sherry. Therefore, it is to be seen, whether A.1 had any inclination or liking towards P.W.3, not only before her marriage with Vivek but also thereafter, with what intention.

65. A.1, deceased-Vivek, P.W.3, P.Ws.5,6,10 and 27 were doing their graduation in the P.S.G.College, Coimbatore, between 1985-1988. The marriage between Vivek and P.W.3 was celebrated on 13.12.1991. It is not the case of P.W.3 that after her declining,

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to accede to the love offer made by A.1, there was any harassment by him, till the date of her marriage with Vivek or even thereafter, till the murder of Vivek on 17.8.1993. Thus, as far as P.W.3 is concerned, she has no grievance of anything against A.1 and in fact, she has not complained about the activities of A.1 also, to anybody, including her husband/the deceased Vivek. Her evidence would disclose, as rightly submitted by Mr.N.Natarajan, the learned senior counsel that till the last minute i.e. even the night prior to the date of the incident, the deceased, P.W.3 and A.1 were in cordial terms, since they had been to a cinema, not having any strained relationship. On the basis of the evidence available so, it was submitted on behalf A.1, that there was no immediate, impelling necessity for A.1, to conspire with others, to commit the murder of Vivek. On the other hand, it is the submission of Mr.Nageswara Rao, the learned senior counsel, on behalf of State, that though the evil mind of A.1, to reach P.W.3, even after her marriage with Vivek, was not exposed expressly, in his inner mind, he was always having a desire, intention, to have connection with P.W.3, and to pave way alone, he had conspired with A.2-his office boy, who in turn contacted other accused and accomplished the commission of the offence, pursuant to conspiracy. Though the evidence would disclose that there was no strained relationship between A.1, Vivek and P.W.3, that alone will not rule out the possibility of conspiracy or that alone will not prove that A.1 would not have conspired, to commit the murder of Vivek, ignoring the other materials available.

66. It is impossible to read the mind of a man, that too, when the man is having an inner desire to achieve a thing, having failed to achieve the said target once. As long as the target and the desire to achieve the same is in one's mind, certainly, his mind would act and plan to reach the target and to attain that purpose and in this view, there is every possibility for the man, to prepare, plan and execute the same, unless it is shown that the original idea or the desire or the target, as the case may be, has completely vanished from the mind of the person concerned. To expose the mind of A.1 or to expose the evil idea of A.1, certainly, the Court cannot expect, from the prosecution, any direct evidence, the same should be gathered from the conduct of A.1.

67. In STATE OF U.P. vs. BABU RAM (2000 M.L.J. (Crl.) 549), the Honourable Supreme Court has noticed the difficulty of the prosecution, to expose the wicked thought of the accused and it also laid down, under what circumstances, that kind of wicked thought or evil idea could be exposed and should be decided by the Court. In Paragraph No.11 of the Judgment, it is stated:

> "No doubt, if the prosecution proves the existence of a motive, it would be well and good for it particularly in a case depending on circumstantial evidence for such motive could then be counted as one of the circumstances. However, it cannot be forgotten that it is generally a difficult area for any prosecution to bring on record what

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was in the mind of the respondent. Even if the investigating officer would have succeeded in knowing it through interrogations, that cannot be but in evidence by them due to the ban imposed by law."

(Emphasis by us)

Further, reiterating the previous rulings, a passage from STATE OF HIMACHAL PRADESH vs. JEET SINGH [(1994) 4 SCC 370], is quoted, which reads:

"No doubt it is a sound principle to remember that every criminal act was done with a motive but its corollary is not that no criminal offence would have been committed if the prosecution has failed to prove the precise motive of the accused to commit it. When the prosecution succeeded in showing the possibility of some ire for the accused towards the victim, the inability to further put on record the manner in which such ire would have swelled up in the mind of the offender to such a degree as to impel him to commit the offence cannot be construed as a fatal weakness of the prosecution. It is almost an impossibility for the prosecution to unravel the full dimension of the mental disposition of an offender towards the person whom he offended."

Having the above principle also, we have to read the mind of A.1 purely on the basis of the circumstances exposed, though he was moving very closely with Vivek and P.W.3, for all practical purposes, externally.

68. In this case, it is the definite case of the prosecution that A.1 always had an eye over P.W.3, though it was lying low for sometime, it had shown its ugly head, when A.1 failed to have a happy married life, though he had chosen a girl as wife of his choice, by name Sherry. If at all, the motive part could be established, it can be only by circumstantial evidence, based upon the conduct of A.1, his behaviour then and there, then connecting the same with the actual act, in this case, murder. If A.1 had completely erased the image of P.W.3 from his memory cell, he should not have thought of a happy married life, generally, if P.W.3 had been his wife. Then alone, the subsequent conduct of A.1 thinking about her, showing something to her, may not have any significance or importance. As revealed by the evidence, the expression made by A.1, his movement with P.W.3 and her husband, and the conversation with his friends would disclose that he has not completely erased the image of P.W.3 from his mind. In his own way, it appears to our mind, A.1 would have lived with P.W.3 mentally, though not physically, and that is why, whenever and wherever occasion came, words surfaced, exposing the inner mind of A.1. On that basis, the reasonable inference should be, to attain or achieve his earlier desire, A.1 should have conspired, to eliminate Vivek, an impediment.

69. A.1 appears to have entered into a marriage agreement with Sherry, after converting her to Hinduism, as seen from Ex.P.2,

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wherein it is said, both of them have married. Even after the alleged marriage, whether it is valid or not, which we are not very much concerned, both of them were not living happily, as husband and wife. Admittedly, A.1 filed an application in H.M.O.P.No.182 of 1993, on the file of the Sub Court, Coimbatore, seeking dissolution of his marriage with Sherry, as seen from Ex.P.7, whereas Sherry has filed a suit in O.S.No.1458 of 1993 on the file of the District Munsif, Coimbatore, to declare her as a Christian; to declare the alleged marriage between herself and A.1 on 6.5.1990 as void and also to declare that the alleged marriage agreement, dated 11.5.1990 is also void. Thereafter, at the instance of the friends, as exposed by the evidence, both parties have reached a compromise and pursuant to the same, the suit, filed by Sherry, was decreed, as per terms and conditions of the compromise petition in I.A.No.1740 of 1993, on 28.7.1993, as seen from Ex.P.13, thus declaring the marriage between A.1 and Sherry as void. Pursuant to the said compromise memo., filed into Court on 18.8.1993, the H.M.O.P., filed by A.1, for divorce, was dismissed, as not pressed, on 27.8.1993, as also seen from Ex.P.7, thereby showing, the compromise memo. was filed on the next day of murder, showing some nexus with the incident. The compromise memo., filed in the suit filed by Sherry, was dated 23.7.1993, just prior to the alleged conspiracy.

70. The conduct of A.1, as disclosed by Exs.P.2 to P.7, would suggest, that A.1 attempted, at least, to clear the way for union with P.W.3, if everything went all right, as desired by him and that must be, because of the reason, he has not removed or erased the image of P.W.3, from his mind, followed by the steps taken, to clear the way. In other words, he was always having an eye over P.W.3, pursuant to the love affair, which he entertained, though not recognised by P.W.3. The fact, A.1 had much liking for P.W.3 is exposed from the materials produced on behalf of the prosecution. P.W.3 would state, that A.1, being her college friend, told her once, that he would like to marry her, for which she said that she has already decided to marry Vivek, which upset him. It is the evidence of P.W.3, that A.1 requested her that this matter need not be divulged to anybody, thereby showing, that he is not willing to disclose about the refusal of his offer, to marry P.W.3 to anybody. Ordinarily, there would not have been any necessity for A.1, to inform P.W.3 about the bungalow constructed by him for his would-be wife or to show the Diamond studs-M.O.16 purchased by him for his would-be wife, to P.W.3. On the other hand, as disclosed by P.W.3, A.1 had informed her, about the bungalow and shown the diamond studs purchased, which would, in a way, suggest that he wanted to disclose to P.W.3, probably having her, in mind as the wife (would be) as if he had constructed a bungalow, for his would-be wife, at the cost of Rs.40 lakhs, in addition to, purchasing diamond studs also. Further, it is the case of P.W.3, that when she and her husband have advised A.1 to marry another girl, since the marriage between him and Sherry failed, he is said to have told them that if he could get an intelligent girl like Sunitha (P.W.3), he would marry. If A.1

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had no intention to have P.W.3 or had disowned her completely, this kind of expression would not have emanated from him, and if at all in the ordinary course, he would have stated that, if any intelligent beautiful girl like P.W.3 is available, he would marry. The very comparison, with P.W.3, by A.1, would suggest, that despite the marriage of Sunitha with Vivek, he had liking towards her, and that alone, automatically, surfaced, when there was conversation between A.1 on one hand, and P.W.3 and her husband Vivek on the other hand.

71. P.W.10-Krishnaraj is the close friend of A.1 - an admitted fact. He would state, that A.1 had a liking towards Sunitha and he felt very bad, when he came to know that P.W.3 decided to marry Vivek. At the instance of P.W.10, with the help of Vivek, some documents were also prepared, with the hope of re-uniting Sherry with A.1. As spoken to by P.W.10, which is supported by P.W.11-father of Sherry, Sherry refused to come with A.1 and not only that, she expressed her desire, to live with one George Thomas, who was married to her, by her father on 4.1.1993, according to Christian rites. As indicated, the legal proceedings initiated also went in favour of Sherry, whether it is on compromise or otherwise. Thus, according to P.W.10, when Sherry refused to come along with A.1, he was very much dejected. In order to console the friend, viz. A.1, P.W.10 and Vivek appear to have advised him to marry a good girl of his choice. For this also, according to P.W.10, A.1 refused, stating "there is no new girl in my life', which would indicate that he is having some idea of the old girl, probably P.W.3, the ex-lover.

72. P.W.9-a cloth merchant, would state, that elsewhere in June 1993, Vivek, his wife Sunitha (P.W.3) and A.1 came to his showroom for purchasing furnishing materials to his house and Sunitha-P.W.3 alone had selected clothes, which was approved by A.1. The conduct of A.1, taking Sunitha along with him, though accompanied by her husband, for selecting screen cloth to his bungalow, also, in a way, would suggest, that he had so much liking towards P.W.3, and that is why, he should have allowed her to select the clothes, and approved the same, as such. Thus, the prosecution, by the examination of P.W.10-the friend of A.1, P.W.11-the father of Sherry, made out a case, unquestionably, that A.1, despite refusal by P.W.3 to marry him, had a liking towards her, always, which became so aggressive, when he met the failure in his married life with Sherry. What A.1 did, as said, as proved, are evidence of what lies in his mind. If we read the above circumstances, coupled with other attending circumstances, the cumulative effect would be, that the image of P.W.3 has not been removed and erased from the mind of A.1 and in fact, he was having an eye over P.W.3 always. Because of these reasons, in our considered opinion, A.1 should have planned and conspired, to eliminate Vivek i.e. to commit the murder of Vivek, probably under the hope, that if Vivek is eliminated, there may be a possibility of P.W.3 marrying him, whether that would be fructified

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or not. To achieve this purpose, A.1 should have requested A.2, providing money, to engage hirelings, which is proved, beyond all reasonable doubt, by the strenuous effort taken by the untiring Investigating Officer, who tracked the movement of the accused, from the starting point to the end, thereby compelling us to presume or to draw an inference, that the things between the two points, should have taken place in the ordinary course.

73. It is the case of the prosecution, that M.O.17-photograph of P.W.3 and M.O.20-photograph of the deceased, were together and for the purpose of identifying the deceased, M.O.20 was given by A.1, to the assailants, whereas M.O.17 was preserved by him, in his place, and both of them were recovered, during investigation. Before going into the recovery part, now let us point out, whether M.Os.17 and 20 were together, later cut apart, as claimed by the prosecution. After recovery of these two material objects (which we will discuss infra), they were sent for the scientific examination, through Court, which was done by P.W.50. P.W.50, comparing M.Os.17 and 20, opined, in Ex.P.74, as well as testified before the trial Court, that M.Os.17 and 20 were cut and removed from the single photo, which is not very much challenged, as seen from the cross-examination of this witness. Therefore, it is to be held that M.Os.17 and 20 i.e. the photographs of Sunitha and Vivek were together, which, probably they would have taken after their marriage or so, which came to the possession of A.1, as the investigation revealed.

74. The Investigating Officer-P.W.56, after the arrest of A.1, on the basis of the confession given by him-Ex.P.49, recovered M.Os.16 and 17 under Ex.P.50, in the presence of P.W.38. M.Os.16 and 17 were recovered, as spoken by P.W.56, from a locker. No necessity for A.1, to preserve the photo of P.W.3, that too, a photo cut, separated from other part of the photo-M.O.20. The very fact, M.O.17 was preserved by A.1, along with diamond studs, would indicate that he had indelible thinking or intention, to have P.W.3 with him. The other part of photo, cut from M.O.17, was recovered from the car of A.8, as spoken by P.W.56, as well as P.W.38. Whether the arrest of A.8 could be believed or not, which we will discuss infra, and even assuming that the arrest of A.8, as spoken by P.W.56, may not be true, if it is shown, that M.O.20 was recovered from the car, in which, it is said, the other accused travelled, then, the unavoidable inference should be that the assailants should have obtained the photo of Vivek, only from A.1, through A.2 or somebody and that is the reason, the remaining part of the said photo viz. M.O.17 was recovered from A.1. This proved fact would disclose, undoubtedly, that since A.1 had an intention to reach P.W.3, anyhow, he should have planned to eliminate the hurdle, viz. Vivek, and because of this reason alone, in our considered opinion, M.O.17, preserved by A.1, was recovered from him, whereas M.O.20 was recovered from the car, which was used for the travel of A.9 to A.11.

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75. A.1 is the owner or Managing Director of VLB Textiles and Vijayalakshmi Mills in which A.2 was working as an office boy. A.3 is the driver of A.1. According to the prosecution, A.4 was the Treasurer in the D.K. Youth Wing, Coimbatore; A.5 and A.6 are the sympathisers of P.M.K. and Secretary respectively. A.7 is the leader of Devendra Kula Vellalar Sangham, a prominent figure, as claimed. A.8 is the taxi driver under one Ramalingam, who has been examined as P.W.32 and the registration number of the taxi is TAC 5667.

76. As concluded by us earlier, A.9 to A.11, who are all the residents of Palayamkottai/Tirunelveli, came to Coimbatore, committed the murder, during day time, probably under the hope, no one can touch them, since they would escape to Palayamkottai, which is 400 km. away from Coimbatore. When the investigation commenced, P.W.56 had no idea about the assailants and more or less, he was in dark. The untired effort taken by P.W.56, brought to his knowledge, about the reservation made by A.2, for the travel of four persons, to Madurai in Rameswaram Express and thereafter, their stay at Tirunelveli, where it is said, they have made an attempt to contact A.7, a powerful man, who could arrange hirelings. In order to prove that A.2 and A.4 to A.6 travelled to Madurai, after making reservation, in Rameswaram Express, then reached Tirunelveli, aid is sought from the oral evidence of P.Ws.20 and 21 and Exs.P.14 and P.15.

77. Ex.P.14 is the reservation application dated 17.7.1993, said to have been given by A.2. P.W.20 being the Chief Reservation Officer, has given evidence only with reference to the document and nothing more. A.2, when he was questioned, while examining him under Section 313 Cr.P.C., about the reservation made by him under Ex.P.14, had disputed the same, as if P.Ws.20 and 21 are giving false evidence. But, fortunately for the prosecution, in the statement filed by him under Section 233(2) Cr.P.C., he had admitted the preparation of Ex.P.14 as well as his handwriting and signature in Ex.P.14. Thus, it is made clear that only at the instance of A.2, reservation was made on 17.7.1993, for journey, by Train No.6115 Rameswaram Express from Coimbatore to Madurai for four persons. The reservation was made for the travel of Sivakumar (A.2), Abdullah Yusuf (A.5), Tamilselvan (A.4) and Kareem (A.6), as per the intrinsic evidence available in Ex.P.14. This document was also examined by the Handwriting Expert-P.W.42, comparing the handwriting and signature therein with that of the admitted signatures of A.2, which were obtained from him in the Court, in the presence of the Judicial Magistrate. The Handwriting Expert opined that Ex.P.14 should have been written by A.2. As far as A.2 is concerned, because of his admission in his statement under Section 233(2) Cr.P.C., we are not going to discuss, at present, whether the signature taken is barred under Section 73 of the Indian Evidence Act, or whether the comparison of the said signature with the

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disputed signature in Ex.P.14 is valid or not, whereas we will discuss, when we come to the other accused, who have disputed their signatures in the disputed documents.

78. A.2, having admitted that he had written/prepared Ex.P.14/signed in Ex.P.14, made an attempt to explain, that the name found in Ex.P.14 as 'Sivakumar' does not refer to him, whereas it refers to another Sivakumar, a friend of him, who belongs to D.K.party. Thus, an attempt was made, to say, that no ticket was reserved for him, to travel to Madurai. The so-called explanation must be a myth, emanated from the fertile imagination of A.2, was exposed by the intrinsic materials available in the document itself, as well as the improbabilities also. As claimed by A.2, if he had prepared Ex.P.14, for the reservation of some other Sivakumar, there would not have been any necessity, for him to furnish his address, in Ex.P.14. Further, after filling up the application, he should have handed over the form to the alleged Sivakumar, for affixing his signature, which should be the proper and normal way, if an application is filled-up, at the request of somebody. Further, the address of the said Sivakumar alone should find place, in the reservation slip. But, contrary to all the natural conduct and probability, the address of A.2 alone had been furnished in Ex.P.14 and he alone had signed, which is admitted by him. Therefore, it is incumbent upon A.2, to explain, satisfactorily, that the name 'Sivakumar', mentioned in Ex.P.14, is not he, whereas it refers to his friend, by examining the said Sivakumar or giving his address or disclosing his whereabouts, so as to enable the police, at least to bring him. On the other hand, in the written statement filed on behalf of A.2, under Section 233(2) Cr.P.C., it is stated that 'Sivakumar', whose name does find place in Ex.P.14, had gone to Saudi Arabia and the accused do not know, even his address. A.2 claimed that the person 'Sivakumar' found in Ex.P.14 is a close friend of him, and that is why, he obliged him. If that is so, at least, he should have disclosed his address, whereabouts, which he had not given. The non-explanation, as referred to above, to the satisfaction of the Court, and the admission of A.2, about his address and signature finding place in Ex.P.14, certainly, would suggest that A.2 alone should have reserved tickets, not only for his travel from Coimbatore to Madurai, but also for the travel of other three accused.

79. Mr.S.Ashok Kumar, the learned senior counsel appearing for A.2, would submit that even assuming that reservation was made by A.2, there is no material to show that A.2 along with three other accused, have travelled actually in the train, which should follow, there is a snap in executing the alleged conspiracy or in other words, the link is missing. It is the case of P.W.20 that he issued the reservation chart for Ex.P.14, allotting seats in S.2 coach, which is also proved by Ex.P.15. But, as rightly claimed by the accused, which is also fairly conceded by the prosecution, there is no direct evidence, to show that these four accused have travelled

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in the train, which is also the case of P.W.20, since he has stated that he does not know, whether the persons, whose names are found in Ex.P.15, have actually travelled by the train or not and if at all that could be ascertained, only from the Train Ticket Examiner. In our considered opinion, even by the examination of the Train Ticket Examiner, it may not be possible to say, with certainty, that the persons mentioned in Ex.P.14 have actually travelled in the train, in view of the admitted position, that there was no identity of the person, either in the reservation form or in the reservation chart, affixing photo etc. In this view, even if the Train Ticket Examiner has been examined, there is a possibility of urging that somebody might have travelled in the name of the persons, whose names are mentioned in Ex.P.15, thereby to exclude A.2 and A.4 to A.6 as if they have not travelled. Therefore, in this kind of case, proving the reservation and commencement of journey, if the destination is proved, then, under the ordinary circumstances, an inference or presumption could be drawn that the persons for whom the tickets were reserved would have travelled and that is how, they have reached the place where they have stayed.

80. It is fairly conceded by the learned senior counsel appearing for the State, that there is no material to prove the mode of transport from Madurai in which, all the four accused (A.2 and A.4 to A.6) have travelled to Tirunelveli, though there is evidence about their stay at Tirunelveli in a lodge.

81. According to prosecution, while they were at Tirunelveli, A.4 attempted to contact A.7, through phone, and after coming to know, that A.7 was not available at Tirunelveli, whereas he is available at Chennai, A.2 and A.4 to A.6 came to Chennai, met A.7 and then returned to Coimbatore on 19.7.1993, by reserving tickets, in Train No.6005, sleeper class. In support of the above contentions, aid was sought from Exs.P.16 and P.17, in addition to the oral evidence of P.W.21. To connect A.4 with the reservation slip-Ex.P.16 and to show that he stayed in a lodge at Tirunelveli, writings, signatures available in the lodge register, bills and Ex.P.16 were compared with his handwritings and signatures, which were obtained from him, by the Judicial Magistrate, at the request of the Investigating Officer, as spoken by P.W.55.

82. The learned counsel appearing for A.2, drew our attention to the Attendance Register-Ex.P.80, maintained for the month of July, 1993, as well as the oral evidence of P.W.52 to disprove, or falsify the case of prosecution, viz. A.2 travelled in the train upto Madurai and reached Tirunelveli. P.W.56, after verification of the Attendance Register, noticed the corrections, which is visible for naked-eye also, indicating the marking for A.2 must be fresh and not on the date it bears. It is admitted by P.W.52, during cross-examination by A.1 and A.2, that he had marked attendance for A.2,

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in Ex.P.80, for the dates 17.7.1993, 19.7.1993 and 20.7.1993, thereby showing, as if he was available on those dates, in the office, thereby informing that he would not have travelled elsewhere. It is not the case of P.W.52, that the office boy-A.2, himself had signed in the attendance register, whereas it is the specific case of P.W.52, that he had marked the attendance for A.2, on his own. In this context, we have to see, how the attendances are marked for the Office Boys as well as for others. P.W.52 would state, if the persons are workers in the Mill, they would show the time card and on seeing the same, he would mark the attendance, providing double safeguard, for the attendance of the workers. He further states, as far as Office Boys are concerned, since they would be engaged in the office, elsewhere, on the information furnished by somebody, he would mark the attendance, not seeing the individual concerned. This is what had happened in the case of A.2 also, as exposed by the oral evidence of P.W.52. Therefore, from the marking of the attendance for A.2, in Ex.P.80, by P.W.52 alone, one cannot definitely say that A.2 would have attended the office on 17.7.1993 and 19.7.1993 since 18.7.1993 was a holiday. As per the reservation slip-Ex.P.14, they intended to travel on 17.7.1993 night and therefore, the presence of A.2 in the office on 17.7.1993 may not have any significance. The important date must be 19.7.1993, since it is said A.2 travelled along with other three accused on 19.7.1993, from Madras Central to Coimbatore, in Train No.6005 Nilgiri Express, as per the reservation slip-Ex.P.16 and the reservation chart-Ex.P.17, as spoken by P.W.21 also. Therefore, considering the corrections available in Ex.P.80, as well as the fact that A.2 himself has not signed in the attendance register and the reservations made for his journey from Madras to Coimbatore, we are declined to accept Ex.P.80, as genuine entry, as far as A.2's presence is concerned and the entries must have been made, if at all, subsequently, to eclipse the actual journey of A.2, along with others on 19.7.1993 from Madras.

83. At the request of the Investigating Officer, the Judicial Magistrate-P.W.55, despite objections raised by the accused, to obtain their signatures, as well as handwritings, rejecting the same, obtained the handwritings and signatures of A.1,A.2, A.4 and A.6. Ex.P.90 is the paper containing the signatures and handwritings of Sivakumar-A.2. Ex.P.91 does contain the handwritings and signatures of Ubaiadulla-A4. The above said two signatures and handwritings were obtained as per the proceedings under Ex.P.92. Thereafter, the signatures and handwritings of Pavunraj-A.10 were obtained under Ex.P.93 and the handwritings and signatures of Prince Kumar-A.11 were obtained under Ex.P.94, as per the proceedings under Ex.P.95. In the same way, from A.1 also, signatures and handwritings were obtained, as seen from Ex.P.96, under the proceedings- Ex.P.98.

84. P.W.23 is the owner of Janakiram Hotel at Tirunelveli. According to prosecution, A.2 and A.4 to A.6 have stayed in his

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hotel on 18.7.1993, for which entries were made in ex.P.20, in addition to, for payment, the counterfoil was issued, which is Ex.P.21 and for making local call, the document is Ex.P.22. Admittedly, this witness has not written all the above said documents. Therefore, Mr.K.Asokan, the learned senior counsel appearing for A.4, A.6 and A.8, would submit, inviting our attention to the judgment of the Apex Court, in PAWAN KUMAR vs. STATE OF HARYANA (2004 SCC (Cri) 109), that entry, in the hotel register, is not admissible in evidence, since A.4 has not signed, even according to P.W.23, in his presence.

85. In the case involved in the above decision, it was admitted, by the owner of the hotel, that he was neither present when the register was signed nor knew the writings or signature of the accused person and considering the above facts and circumstances of the case, the Apex Court has ruled, that accepting the oral evidence of the owner of the lodge or the hotel, it cannot be held that the same was proved and in this context, it is said that entry in the hotel register is not admissible. As seen from the said judgment, entry was not examined by the Handwriting Expert with the signature of the accused therein. Therefore, in our considered opinion, the Apex Court has taken such a view, since the entry has been exhibited on the basis of the statement of the owner and the same is not legally proved, inadmissible in evidence, which could be seen from the reading of Para No.7 of the judgment. On the other hand, in the case on hand, by the Expert Opinion if accepted or by comparison, which we will discuss hereunder, the writings of A.4 are proved and therefore, applying the ratio laid down by the Apex Court, in the above Ruling, it is not possible to hold Ex.P.20 is inadmissible in evidence. As far as the handing over of Exs.P.20 to P.22 to the Investigating Officer is concerned, it is not very much challenged, as seen from the cross-examination. Therefore, if those documents are otherwise connected with any one of the accused, that would be a relevant factor, to connect the accused.

86. The prosecution, in order to make out a case that the fourth accused, once again went to Tirunelveli, contacted A.7, relied on Ex.P.26, as well as Exs.P.27 and P.28. P.W.26 is the Receptionist in Blue Star Hotel at Tirunelveli. He would state that on 1.8.1993, one Tamilsevan from Coimbatore, came to his hotel and on his request, Room No.316 was allotted. It is the further case that the said Tamilsevan himself had made the entry-Ex.P.26, but, very fairly, he would admit, during the cross-examination by A.4 to A.6, that he cannot identify Tamilselvan, though he knew A.7-John pandian. As far as the recovery of these documents are concerned, we find no dispute. Though P.W.26 has not identified Tamilselvan (A.4), he has stated, specifically, that Tamilsevan had signed in Ex.P.26. If that Tamilselvan is connected with Ex.P.26, as that of A.4, then, that will have relevance. In this view, Ex.P.26 is admissible in evidence, not only on the basis of the evidence given by P.W.26, but also on the basis of the Expert Opinion, or

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comparison by us, given by P.W.42.

87. A.4 was originally called, only as Ubaiadulla. It is spoken by P.W.56, that when he came to know that Ubaiadulla is having alias name, on the basis of Ex.P.31, A.4 was described as Ubaiadulla @ Tamilselvan. P.W.31, who was the Deputy Leader of Youth Wing, Dravida kazhagam, would state, that in the resolution-Ex.P.31, Tamilselvan has signed, which was handed over to the Inspector, at his request. But, when he was cross-examined by A.4 to A.6, he would state, among the accused, no Tamilselvan is there and the 'Tamilselvan', who signed in Ex.P.31, belongs to Vellalur. After P.W.31 has given evidence, as said above, he was not treated as hostile. Therefore, there is nothing wrong, on the part of the accused, to rely upon the evidence of P.W.31, to urge, as if he had excluded Tamilselvan from the array of accused. Thus, the learned counsel appearing for A.4 would contend that even as per the evidence given by P.W.31, Tamilselvan, who signed in Ex.P.31, is not prosecuted and therefore, A.4, who was named originally 'Ubaiadulla', cannot be christened by alias name Tamilselvan and in this view, comparing the handwriting of Ubaiadulla with the signature of Tamilselvan, would not prove that A.4 stayed at Tirunelveli or he had reserved ticket, from Madras Central to Coimbatore on 19.7.1993. By giving our anxious thought to the above said submission, we fail to see any logic in this argument. True, for not treating P.W.31 as hostile, the accused can take advantage. But, that does not mean, we should exclude or exonerate A.4 from this case. Whether A.4 was known as Tamilselvan or not, if it is proved that A.4-Ubaiadulla had stayed in the hotel, in the name of Tamilselvan or signed as Tamilselvan, while he stayed in the hotel or made some entries and reserved tickets for the travel from Chenai to Coimbatore, certainly, he could be connected with the conspiracy and it may not be necessary that the prosecution should prove, beyond all reasonable doubt, that A.4 Ubaiadulla is known as Tamilselvan also. In this view, the evidence given by P.W.31, as if among the accused, there is no Tamilselvan, certainly, will not exclude A.4 or exonerate him from the offences. The role played by A.4, in the conspiracy, would depend upon his stay in the hotel, as well as the writings available in the Registers, since it is said, he himself had made entries, while he was staying, as well as signed in the Register. Further, in the railway reservation slip-Ex.P.16, if his handwritings and signature, even in the name of Tamilselvan, does find place, that would connect him, as if he has travelled from Chennai Central to Coimbatore along with other accused, in continuation of his journey, which started from Coimbatore viz Madurai, Tirunelveli, Chennai, then to Coimbatore and in this view, the opinion given by the Expert, analysing those documents, are relevant, if there is no bar.

88. Thiru R.Srinivasan-P.W.42, an expert in examination of Handwritings and Signatures, having experience of 17 years, compared the signatures and handwritings of A.2, A.4 and A.1 with the

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disputed documents, especially where it is said A.4 had signed, which we are concerned, much, since it is disputed. As seen from the oral evidence of P.W.42, he had assigned 'Q.4 and Q.5' marks in Ex.P.16 i.e. the disputed handwritings and signature respectively; Q.6 and Q.7 in the handwriting available in the Register of Janakiram Lodge,-Ex.P.20 Tirunelveli and 'Q8' to the signature of 'Mu.Tamilselvan'. For the payment of lodge charge, Ex.P.21 receipt was issued, in which, there is signature of Tamilselvan, which is marked as 'Q9'. On 1.8.1993, A.4 stayed at Tirunelveli in Hotel Blue Star and the relevant register is marked as Ex.P.26. The markings of Q.10 and Q.11 were given to the handwritings and signatures found in that document, as 'Tamil Selvan' respectively. We need not strain ourselves regarding the comparison of signatures of A.1 and A.2 with the documents by the expert since both of them have admitted their signatures in the cheque and A.2 has admitted about his handwriting and signature in Ex.P.14 also. Therefore, we have to see the disputed signature viz. 'Tamilselvan'.

89. P.W.42, marked the sample handwritings of Tamilselvan as S.8 to S.14 and the signatures as B1 to B8 and opined, that the person, who wrote the writings and signatures stamped and marked S8 to S14 and the signatures B.1 to B.8, also wrote the signatures stamped and marked as Q5, Q8, Q9, Q.11 and Q.12, further opining that the same person also wrote the writings marked as Q4, Q6, Q7 and Q10, thereby probablising, in a way proving also, that A.4, whether he is known as 'Ubaiadulla' or 'Tamilselvan', stayed at Janakiram Lodge, Tirunelveli, as well as Blue Star Hotel at Tirunelveli on 18.7.1993 and 1.8.1993. The opinion, that Ex.P.16 does contain the handwritings and signature of Tamilselvan (is to be accepted) that of A.4, also would suggest that he should have made reservation for his travel along with three others under Ex.P.16 on 19.7.1993, from Chennai to Coimbatore.

90. At this juncture, the learned senior counsel appearing for the appellants would contend that the Court has no power, to take the signatures or handwritings of the accused, while the case is pending at the investigation stage and such powers are also not available under Section 73 of the Evidence Act, this being the position, the comparison and report filed regarding the handwritings and signatures of the accused is also inadmissible evidence, which should follow, the involvement of A.4 or A.2, A.5 and A.6 is not at all proved or in other words, there is a snap in the alleged circumstances, disproving the conspiracy or not making out a case of conspiracy, which were not properly considered by the trial Court. Therefore, before going into the factual aspects of this case, it is to be seen,

> "whether Section 73 of the Evidence Act is a bar, for taking the signatures and handwritings of the accused, while the case is under the stage of investigation, whether the Magistrate is not competent to direct the

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accused to furnish the signature or handwritings, as the case may be, enabling or facilitating the prosecution to complete the investigation?"

91. A Constitution Bench of the Apex Court, consisting of 11 Honourable Judges, has ruled in STATE OF BOMBAY vs. KATHI KALU OGHAD AND OTHERS (1961 (2) Cri.L.J. 856 = AIR 1961 SC 1808):

"Giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification are not included in the expression 'to be a witness'. Therefore, there was no infringement of Article 20(3) of the Constitution in compelling an accused person to give his specimen handwriting or signature, or impressions of his thumb, fingers, palm or foot to the Investigating Officer or under Orders of a Court, for the purposes of comparison under the provisions of S.73 of the Indian Evidence Act."

However, the Supreme Court in a later judgment reported in (1980) 2 SCC 343 (STATE OF UTTAR PRADESH vs. RAM BABU MISRA) held that the Constitution Bench in the above case did not consider the impact of Section 73 of the Evidence Act.

92. In SUKHVINDER SINGH AND OTHERS vs. STATE OF PUNJAB (1994 SCC (Cri) 1376), while considering the scope of Section 73 of the Indian Evidence Act, the Apex Court has held:

"The language of Section 73 does not permit any court to give a direction to an accused to give his specimen writing for comparison in a proceeding which may subsequently be instituted in some other competent court. Section 73 of the Evidence Act cannot be made use of for collecting specimen writings during the investigation and recourse to it can be had only when there is a proceeding pending on the file of a Court."

93. The same view was taken by the Apex Court in STATE OF HARYANA vs. JAGBIR SINGH AND ANOTHER [(2003) 11 SCC 261], which says:

"Court has no power under second part of Section 73 to direct the accused to give his specimen signature for comparison, during investigation."

The main thrust of the learned senior counsel Mr.Asokan, supported by other senior counsel, on the basis of the above rulings, is that in this case, obtaining the signatures of A.4, under the direction of the Judicial Magistrate, the same being compared with the disputed handwritings and signatures of Tamilselvan and in view of the bar imposed under Section 73 of the Evidence Act, supported by the Apex Court's rulings, the comparison, as well as the report, based on that, should go. It is the further submission, that if the handwriting Expert's Opinion is eschewed, on the above basis, then, practically, there is nil evidence, to connect A.4 with the alleged conspiracy and in this view, A.4 to A.6 should get the relief of

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acquittal.

94. As submitted by the learned senior counsel appearing for the accused, the reading of the above said two judgments, would indicate, that there is a bar under Section 73 of the Indian Evidence Act, to obtain the signature of the accused for comparison due to intervention of Court.

95. In VIJAY ALIAS GYAN CHAND JAIN vs. STATE OF M.P. [(1994) 6 SCC 308], the Apex Court has ruled 'the procurement of specimen handwriting of accused by Naib Tehsildar, for the comparison with the disputed handwriting, is not violative of Section 73 of the Indian Evidence Act'. In paragraph No.8 of the judgment, it is observed:

> "In the facts of the case, Section 73 of the Evidence Act has not been violated"

But, it must be noted that in this case no Court has intervened directing the accused to give specimen signatures to the Naib Thasildar and it appears that the said Authority had collected specimen signatures of the accused on its own efforts.

96. Mr.Nageswararao, the learned senior counsel for the State, submitted that the Investigating Agency has not filed any application under Section 73 of the Evidence Act before the trial Court, to issue any such direction to the accused, to provide specimen handwriting or signature, as the case may be. In fact, they have approached the trial Court, seeking the permission of the Magistrate to take the handwritings, as well as the signatures of the accused, in the presence of the Magistrate, only on the ground, there should not be any dispute later on, but because of the fact, the accused were in judicial custody. It is his further submission, while passing the order, the learned Judicial Magistrate has invoked Section 73, and therefore, that will not nullify the signatures or the specimen handwriting taken in the presence of the Judicial Magistrate, by the safest method, which were compared by the Handwriting Expert, at a later point of time.

97. In a criminal case, even before filing the final report, when there was no enquiry or trial before the Court concerned, the role of the criminal court, to certain extent, is unavoidable and it is a must, to secure the ends of justice. During the investigation, at the request of the investigating agency, the Courts are conducting the Test Identification Parade, sending the material objects for chemical examination, recording Dying Declarations, as well as confession statements of the accused etc., which is approved in STATE THROUGH CBI vs. DAWOOD IBRAHIM KASKAR AND OTHERS [(2000) 10 SCC 438], wherein it is stated:

> "It cannot be gainsaid that a Magistrate plays, not infrequently, a role during investigation, in that, on the

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prayer of the Investigating Agency he holds a test identification parade, records the confession of an accused or the statement of a witness, or takes or witnesses the taking of specimen handwritings etc. However, in performing such or similar functions the Magistrate does not exercise judicial discretion like while dealing with an accused of a non-bailable offence who is produced before him pursuant to a warrant of arrest issued under Section 73."

These statements are relied on, as evidence and not ignored as if the Judicial Magistrate enabled the prosecution to collect evidence.

98. In the light of the case laws referred to above, namely, whether the Court has any power, as has been done in this case, to direct the accused to give their specimen signature and handwriting, let us apply our mind to the facts available. To reiterate, law is clear on the subject and they are reported in 1994 SCC (Crl.) 1376 (SUKHVINDER SINGH v. STATE OF PUNJAB); 2004 SCC (Crl.) 126 (STATE OF HARYANA vs. JAGBIR SINGH); 1980 SCC (Crl.) 444 (STATE OF UTTAR PRADESH vs. RAM BABU MISRA). In all these cases the Supreme Court had clearly laid down that pendency of a proceeding before a Court is sine-qua non for exercise of power under Section 73 of the Indian Evidence Act. In the absence of a pending proceeding, if any court gives any direction to the accused to give his specimen signature to enable the prosecution to have it compared with the disputed signatures, then the evidence collected on such comparison is inadmissible. In addition to section 73 of the Indian Evidence Act, which gives the power to the Court only in the stated circumstances therein to direct a person to give his specimen signature, the Court also gets its power under the Identification of Prisoner's Act, 1920 (Central Act). Under this Act taking a specimen signature or handwriting is specifically excluded. Learned senior counsel appearing for the State is not in a position to bring to our notice any other provision of law under which the Court has the power, during investigation, to direct a person to give his specimen signature.

99. Learned counsel for the State relies upon the decision of the Supreme Court reported in AIR 1961 SC 1808 (STATE OF BOMBAY vs. KATHI KALU OGHAD). The above referred to judgment is by a Constitution Bench consisting of 11 Judges. A learned Division Bench of the Supreme Court in the judgment in Ram Babu Misra's case cited supra, had held that the legal bar under Section 73 of the Evidence Act was not considered in the above referred to Supreme Court judgment and what was decided was that there is no testimonial compulsion under Article 20(3) of the Constitution of India when a direction is given to give specimen signature and handwriting for the purpose of comparison. Following the decision in the Sukhvinder Singh's case cited supra, there is another judgment of the Supreme Court of equal coram i.e., (1994) 6 SCC 208, where Their Lordships appear to have said that the signature taken

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by an Executive Magistrate would not amount to violating Section 73 of the Evidence Act. We went through both the judgments carefully and we find that while in the former judgment there was a direction from the Court to the accused to give his specimen signature and the Supreme Court said that it violates section 73 of the Evidence Act, while in the latter case, there was no such direction at all and what appears to have taken place is the Tahsildar on his own introduced himself to the accused and took his/their specimen signature. Therefore, we find on the above distinguishing facts that there is no conflict in the two judgments.

100. In STATE OF BOMBAY vs. KATHI KALU OGHAD, AIR 1961 SC 1808, the Supreme Court was hearing a batch of appeals as to whether there was any testimonial compulsion. There were three appeals before the Supreme Court. The facts in Criminal Appeal No.146 of 1958, shows that to compare the signature of the accused in Ex.5, the police, during the investigation, had obtained from him three specimen signatures, which were marked as Exs.27 to 29 and the question whether, taking such specimen signatures during investigation was hit by Article 20(3) of the Constitution of India was in the issue before the Supreme Court. In Criminal Appeals No.110 and 111 of 1958, which was considered by the Supreme Court in the above referred to judgment, the facts show that during the investigation police had recovered glass panes and phials containing some palm and thumb impression and to have it compared the police got the palm and finger impression of the accused taken in the presence of a Magistrate. Whether taking such impressions is violative of Article 20(3) of the Constitution of India was the issue. In criminal appeal No.174 of 1959, the third appeal before the Supreme Court, under the orders of the Magistrate during investigation, specimen signature and specimen handwriting of the accused were taken. Once again, the issue was whether taking the specimen signature and handwriting under the direction of a Court would hit Article 20(3) of the Constitution of India. The Calcutta High Court, which dealt with the case out of which criminal appeal No.174 of 1959 arose, was of the opinion that the earlier judgment of the Supreme Court reported in AIR 1954 SC 300 (M.P.SHARMA v. SATISH CHANDRA) did not govern the case of a direction given by the Court under Section 73 of the Indian Evidence Act. On consideration of the materials, the Supreme Court had arrived at seven conclusions which are enumerated in paragraph 16 of the judgment of the majority. Out of that conclusion No.4 extracted hereunder is heavily relied upon by the learned senior counsel for the State to contend that the specimen signature taken in this case under orders of the Court is violative of either Article 20(3) of the Constitution of India or Section 73 of the Indian Evidence Act:

> "Giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showings parts of the body by way of identification are not included in the expression 'to be a witness."

After answering the point of Law, the Honourable Supreme Court of

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India directed the appeals to be listed before the regular Bench for disposal on merits in accordance with the principles laid down by it. Therefore the question whether a direction given by a Magistrate during investigation to an accused to give his specimen signature/handwriting would be legal and if so, what follows therefrom would be the subject of decision on merits in C.A.No.174/1959. That judgment on merits had not been indexed at all. Therefore through the Registry of this court, we tried to get the judgment in C.A.No.174/1959 from the Apex Court. But the Registry of the Supreme Court forwarded only the record of proceedings dated 25.9.1961 in the above case which show that the appeal was allowed. It was by a Bench of three Hon'ble Judges. From that record we are not able to find on what point the judgment of the Calcutta High Court was reversed. This court is informed that the detailed order in that case is not available. Our efforts to get that judgment from the Registry of the Calcutta High Court also did not yield any result.

101. We have also referred to the latter judgment of the Supreme Court in 1980 SCC (Crl) 444 (STATE OF UTTAR PRADESH vs. RAM BABU MISRA), wherein a Bench consisting of two learned Judges in paragraph 7 had held that in Kathi Kalu Oghad's case cited supra, Section 73 of the Indian Evidence Act was not focussed and this impact was therefore not considered. In Sukhvinder Singh's case cited supra, the Supreme Court had gone to the extent of saying that the report of the handwriting expert given comparing the signatures of the accused taken during the investigation with the intervention of Court, is of no consequence at all and cannot be used against the accused. In view of the law clearly laid down by the Supreme Court in the judgments referred to earlier, we have no hesitation at all that the handwriting expert's evidence and his opinion that the disputed documents contain the signature of A4 which was given on comparing the signatures of A4 taken with the intervention of the Court at the investigation stage, is of no consequence at all and it has to necessarily be excluded.

102. But still the question is, whether on the evidence available, can the prosecution case be sustained? In a case of criminal conspiracy, Courts have been holding that it is impossible to get direct evidence since conspiracy is always hatched in secrecy. Conspiracy is like a train and whoever gets into the train at any particular place and alights at a different place, they are liable as conspirators till the unlawful object is accomplished. It has also been laid down as a principle of law by the Supreme Court that every conspirator need not know who the other conspirator is. Likewise, every conspirator need not take part in the entire course of conspiracy and there may be instances where certain conspirators do a specified job entrusted to them; then leave the place; from then on some other conspirator take up that cause; travel up to a distance; leave the place and so on and so forth. Having the above concept of conspiracy in our mind we have perused

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the evidence very carefully with meticulous attention. According to the prosecution, A1 had decided to do the unlawful act; the unlawful act being finishing Vivek; the modus operandi adopted by him in achieving the object, as unfolded, by the prosecution appears to be as hereunder :

> "A1 has his target in his mind; A2 is his employee; A1 had indicated his mind to A2; A2 on his part gets into contact with A4 to A6; they together travelled to Coimbatore from Tirunelveli; A7 is an ordinary resident of Tirunelveli; an attempt was made to contact him there; A2 to A6 travelled to Chennai; A7's presence in Chennai is established; A2 to A6 travelled back to Coimbatore from Chennai; A1 withdraws money by the end of July 1993 through A2; A4 reaches Tirunelveli on 01.08.1993 and stays there in Blue star hotel; A5 and A6 are stated to have made calls from Coimbatore to A7's telephone in Tirunelveli; A9 to A11 travelled in a taxi driven by A8 via Coimbatore to Ooty; On 17.08.1993 the dastardly act of the murder of Vivek, which, as per the prosecution was done by A9 to A11, took place and eye witnesses are there for the occurrence.

103. We have the evidence of eye witnesses regarding the occurrence proper. A9 to a11 have no axe to grind against the deceased, but the fact remains established that A9 to A11 murdered Vivek. The question therefore arises as to why and what for A9 to A11 murdered Vivek. We have already referred to the arrest of A2 leading to the arrest of the other accused and the respective recoveries. It is no doubt true that the prosecution relies upon the handwriting expert's opinion, which discloses that A4 had signed in the register at Janakiram hotel, Tirunelveli; had signed the reservation application form for the onward journey from Chennai to Coimbatore; his signature in the Blue Star Hotel Arrival register.

104. On the above noted facts, we will have to find out whether de hors the handwriting expert's opinion, are there any material to connect A2 to A6 as playing a part in their capacity as conspirators in the conspiracy projected before the Court by the prosecution. A2 had admitted his signature in Ex.P.14, the railway reservation application form given for the onward journey for four members from Coimbatore to Madurai; the names of A2 to A6 are found entered in Ex.P.14; as already stated A2 admitted his signature in Ex.P.14 and that he had filled up the form that contains his house address. The explanation given by him is that he filled up the form on a request of his friend Sivakumar; (A2's name is also Sivakumar), and beyond that he did not know anything else is far from convincing and it appears to our mind to be a tissue of lie. He states in his statement filed under Section 233(2) of the Code of Criminal Procedure that Sivakumar is a bachellor and that he had left India and that his whereabouts are not known. In a case of conspiracy, as already stated, the prosecution can only place certain materials

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prima facie connecting the accused in the case and request the Court to legally infer as to what follows from that. If such material prima facie establishes the involvement of the accused, then in our considered opinion, they have a duty to explain. A2 had admitted that except Sivakumar, whose name is mentioned in Ex.P.14, he did not know anybody else. This explanation is not convincing us at all. Ex.P.14 and the chart prepared on that application, Ex.P.15 are official records maintained in the usual course of business. We are asking a question to ourselves as to why we should not draw a presumption that persons whose names are mentioned in Exs.P.14 and P.15 (names are the same and who are A2 to A6), have travelled by that train. Our presumption gets strengthened by the fact that from the hotel register, namely, Ex.P.20 at Tirunelveli on the following day of journey, the name of Tamilselvan (A4) giving his place of origin as Coimbatore is found entered. Under these circumstances, we have no hesitation at all to conclude that A2 to A6 travelled as per the reservation application form, Ex.P.14 and Railway chart, Ex.P.15 from Coimbatore to Madurai. P.W.23 would state in his evidence that Ex.P.20 contains the details that a person by name Tamilselvan (A4) from Coimbatore had stayed there and totally four persons were there. He had also stated in his evidence that the guest himself had signed in the register. Therefore, the prosecution wants the Court to rely upon Ex.P.20 containing the signature of Tamilselvan as a document pointing the finger to A4. When the prosecution relies upon Ex.P.20, as containing the signature of Tamilselvan (A4) and it prima facie relates to A4, and P.W.23 states that the guest himself has signed in the register, a duty is cast upon A4 to deny his signature. But A4 had not even suggested to P.W.23 that Ex.P.20 does not contain his signature. In our opinion, the prosecution cannot do anything better than examining P.W.23 and marking Ex.P.20 through him. A4 when confronted with the evidence of P.W.23 when he was questioned under Section 313 of the Code of Criminal Procedure, would only state that his evidence is false. It is not his case that Ex.P.20 does not contain his signature. In his written statement filed at the end of his questioning, except stating in this context that he did not go to the hotel and he did not stay in the lodge, he had not taken any specific stand that the signature relied upon by the prosecution is not that of his.

105. The next piece of circumstance relied upon by the prosecution is the oral evidence of P.W.21 coupled with Ex.P.16 the filled up railway reservation form and Ex.P.17, the chart. From the above evidence, the prosecution wants us to hold that the same four persons who travelled from Coimbatore to Madurai also travelled from Chennai to Coimbatore as per the two documents referred to above. P.W.21's evidence is that in Ex.P.16 one Tamilselvan had signed and in the application form, his address is given at Kuniamuthur, Coimbatore 641 008. From A4's questioning under Section 313 of the Code of Criminal Procedure, we find that A4 has given his address as stated above. Ex.P.16 had come into existence

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long before the complaint had come to be registered in this case. Therefore, it is not possible to even visualise that the prosecution would have interest in creating a record to sustain their case even before law was set on motion in this case. In Ex.P.20 also A4 has given his address as from Coimbatore. Like Exs.P.14 and P.15, Exs.P.16 and P.17 are also official records. It is impossible for the investigation to prove, by examining any witness that only the four persons whose names are mentioned in the reservation form and in the railway chart, Exs.P.14 and P.15 and Exs.P.16 and P.17, alone travelled. The ticket examiner alone, who would have travelled in the train on that day can speak and in our considered opinion, to insist for such evidence from him about the identity of the persons who travelled in the train as per the chart would be asking for an impossibility to be performed. As we already stated, the prosecution can only place prima facie materials connecting the accused and that is what the prosecution had done in this case. When P.W.21 was examined in cross on behalf of A4 to A6, the line of cross examination was that he was not competent to speak about the entries. It was not even suggested to him that Ex.P.16 does not contain the signature of A4. Of-course, in the written statement filed by him at the end of questioning, A4 had stated that he had not filled up the railway reservation form and he had not made any reservation at all. We find that the names of the passengers and their respective age mentioned in Exs.P.14 and P.16 are identical. Exs.P.16 and P.31 contain the signature of a person signing as "மு. தமிழ்செல்வன்". Ex.P.31 is proved by examining P.W.31. He admits that a person by name "மு. தமிழ்செல்வன்" (M. Tamilselvan) had signed in it. But he would state when he was cross examined by A4 to A6 that the said person, namely, "மு.தமிழ்செல்வன்" (M.Tamilselvan) is not one among the accused. Since from Ex.P.31 the signature of one "மு.தமிழ்செல்வன்" (M.Tamilselvan) stands proved, we had a cursory look of that signature with the signature contained in Ex.P.16 and according to us the style of writing in both the documents is more or less the same. Therefore, we have no doubt at all that "மு.தமிழ்செல்வன்"(M. Tamilselvan), who had signed in Ex.P.31 is the person, who had signed in Ex.P.16. The investigation revealed that Tamilselvan (A4) has an alias name namely, Ubeyadulla. We also find that the signature of said "மு.தமிழ்செல்வன;" (Tamilselvan) more as less resembles the signature of one Tamilselvan, who had signed in Ex.P.21. In other words, the style of writing appears to be similar. Same is the style of writing of "மு.தமிழ்செல்வன;" (M.Tamilselvan) in Ex.P.26 - the arrival register at Hotel Blue Star at Tirunelveli, which is proved by P.W.26. Tamilselvan in Exs.P.16, P.21 and P.26 had written that he is from Coimbatore.

106. The case of the prosecution is that after progressing substantially on the criminal conspiracy phone calls were stated to have been made from Coimbatore to A7's number at Tirunelveli. For this purpose, the prosecution relies upon the evidence of P.Ws.30, 34 and 39. P.W.30's evidence is that he had seen A2, A5 and A6 near the fruit market at Ukkadam, where he used to go to get gunny

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bags. His evidence also shows that persons, who come to buy gunny bags will go to the shop of Jabbar. He would state that he used to buy gunny bags in the fruit market area. His evidence also shows that he also used to go to the shop of Jabbar where he had seen A5 and A6. He would also state that at that time he had seen A5 and A6 conversing with themselves and making use of the nearby STD booth. If the prosecution relies upon his evidence alone to connect A5 and A6, of having made telephone calls from a nearby STD booth, we would have had some hesitation in acting upon his evidence, but his evidence gets corroboration from the evidence of P.W.34 Shabir, who is none other than Jabbar's son. He would state that in the year 1993 he had a fruit shop in Ukkadam; A6 deals with fish; he knows A6; A5 used to come there to buy fruits and therefore, he knows him. Since he did not support the case of the prosecution he was treated as hostile and when cross examined by the State he had admitted that 150 feet away from his shop there is a telephone booth. A4 to A6 cross examined him suggesting that he did not know A5 and A6 at all and he emphatically answered that he knows A5 and A6. A5 and A6 in their respective statement filed under Section 233(2) of the Code, had admitted that each of them knew the other. Therefore, reading the evidence of P.Ws.30 and 34 together, we have no doubt at all that A5 and A6 used to go to the shop of P.W.34 and that P.W.34 knows both of them. Then, we have the evidence of P.W.39, the STD booth owner, who had given the investigating officer, Ex.P.53 the STD booth call roll. He had given evidence only to the effect that he has a telephone booth at Ukkadam and that when police came there to his booth being identified by the accused, he handed over Ex.P.53, the STD booth call roll. He does not know anything else. From Ex.P.53 it is established that several calls had originated from that number to the number of A7. In the light of the above materials noted by us, we have the least doubt that the prosecution definitely established that A2 to A6 had left enblock Coimbatore by train; they stayed as such at Tirunelveli and they moved enblock from Chennai to Coimbatore. From the fact that the names of A2 to A6 are found entered in Ex.P.14 and P.15; Exs.P.16 and P.17, and the name of A4 entered in Ex.P.20 and Ex.P.26, it cannot be said that it is only a mere coincidence. All these records have come into existence long prior to the murderous attack on Vivek took place. When the records have been shown to have come into existence long prior to the occurrence which prima facie connect A2 to A6 with the conspiracy projected by the prosecution, the Courts are bound to evaluate those materials giving them their due credibility. Therefore, unless those prima facie credible materials are demolished by the accused atleast on probabilities, which is not done in this case, we see no reason at all as to why we could not act upon those materials to conclude that A2 to A6 played their part in the conspiracy, namely, in contacting A7. Accordingly, we accept the materials in favour of the State and against the accused. Let us discuss in detail hereunder for our above referred to conclusions.

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107. P.W.23 has no reason to oblige the Police of Coimbatore. It is also not the case of the defence that P.W.23 involved in any illegal activity, thereby he is bound to obey the command of the police, whether it is from Coimbatore or Tirunelveli. In this view, in our opinion, Exs.P.20 to P.22 should have come into existence, at the appropriate time, as indicated therein. As evidenced by Ex.P.22, the person, who stayed in room No.409, contacted Phone Number 72324, which, admittedly, belongs to A.7, who is a permanent resident of Tirunelveli. Under the above facts and circumstances of the case, the possible inference, that could be drawn by the Court, is that pursuant to the conspiracy, to oblige A.1 for consideration or otherwise, A.4 should have attempted to contact A.7, through phone, which probably, failed to yield any result, thereby compelling them to go to Madras, where A.7 was staying.

108. As rightly conceded by Mr.Nageswararao, the learned senior counsel for the State, there is no direct documentary or oral evidence, to pinpoint that A.7 was staying in the MLA Hostel, that too, in the room allotted to Se.Ku.Tamilarasan, MLA, from whom one Bhaskar took the same, as his guest. But, the oral evidence of P.W.18, coupled with Exs.P.8 to P.11, would indicate that many people had been to the room of Se.Ku.Tamilarasan, MLA, to see John Pandian (A.7). As submitted by the learned counsel for the accused, the person, who had written the above said documents has not been examined as witnesses. But, the Deputy Secretary of the MLA Hostel, Chennai, by name K.P.Rajan, has been examined as P.W.18 and he has produced the documents, from lawful and proper custody. The law empowers the Court, to presume that the official acts have been regularly performed, unless the contrary is proved. In view of the presumption available under Section 114 of the Evidence Act, we do not find any reason, to doubt about the genuineness of the entries, in these documents, whether it connects the accused or not.

109. Ex.P.10 indicates that on 18.7.1993, one Visu, not examined, had been to MLA's Hostel, to see John Pandian(A.7) (Ex.P.10). The register also would disclose that one M.Kumar had been to MLA's hostel to see John Pandian (A.7) on 27.7.1993 (Ex.P.11) as well as one P.Mani also had been to MLA's Hostel on 27.7.1993 (Ex.P.12) to see John Pandian, thereby proving, on 18.7.1993, when A.4 had been to Tirunelveli, A.7 was not available there, whereas he was available at Chennai, thereby compelling A.4 and his men (A.2, A.5 and A.6) to come to Chennai. True, as conceded by the learned senior counsel for the State, there is no evidence, at all, that any one of the accused, made an attempt to contact A.7, while he was at Chennai. But, there is concrete evidence, that on 19.7.1993, A.4 made reservation in Nilgiri express, from Chennai Central, to go to Coimbatore. Under Ex.P.16, reservation was made for the travel of Sivakumar (A2), Tamilselvan (A.4), Usuf (A.5) and Abdul Kareem (A6). Pursuant to the same, seats were allotted in S.1 Coach, as proved by Ex.P.17. Though Exs.P.16 and P.17 would disclose about the reservation and allotment

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of seats, certainly, would not prove, the actual travel of the above said accused, as claimed by the learned counsel for the accused also. When the documents had disclosed about the stay of John Pandian (A.7) at Chennai, it is not even denied suggestively, that on 18.7.1993 or 19.7.1993, John Pandian (A7) was not available at Chennai and thereby to say, A.4 would not have had any opportunity to contact him, either in person or through phone. It is also admitted, by P.W.18, that even people used to see the persons, staying in the MLA Hostel, without making entries since the Watchmen cannot prevent them, though there is restriction in the MLA Hostel for free entry. In this way, A.2 and A.4 to A.6 would have contacted John Pandian (A.7) and thereafter alone, on 19.8.1993, to go to Coimbatore A.4 should have reserved tickets, not only for him, but also for three other accused and that is why, he has written Ex.P.16 in his own handwriting, giving the particulars of other accused also. Thus, A.2 and A.4 to A.6, starting from Coimbatore on 17.7.1993, reached Coimbatore on 20.7.1993, by reserving train tickets on 19.7.1993, are proved beyond any shadow of doubt and this is the possible proof also, since it is impossible to move along with the accused by the investigating agency or to trace witnesses, who travelled along with them etc. When the starting point and the end-point are proved, law should presume, that things between the two should have taken place. In this view, we conclude, pursuant to conspiracy hatched, as per the agreement, A.2 and A.4 to A.6 had been to Madurai, Tirunelveli, then to Chennai and then returned to Coimbatore. Next we have to see, after reaching Coimbatore, what is the role played by A.4 to A.6, pursuant to conspiracy.

110. After the arrival from Chennai, according to prosecution, once A.4 went to Tirunelveli, then, while they were at Coimbatore, they contacted A.7, probably ascertaining the movements of assailants and in support of the same, aid was sought from the oral evidence of P.Ws.30 and 34, as well as Ex.P.53. Thiru Shanmughasundaram-P.W.30 would state that he had seen A.5, A.6, when he used to visit the shop of one jaffer, whose son has been examined as P.W.34. It is the further evidence of P.W.30 that they used to chat with one Sivakumar (A.2) and thereafter, they used to go to a STD Booth for making telephone calls. According to him, he heard about the talk relating to some problem, connecting Vijayalakshmi Mills owner and finance company owner. P.W.34, though disowned his statements, which he had given before the Investigating Officer, resulting he being treated as hostile witness, would admit that he knew A.5 and A.6. These evidence would suggest that they had continued their activity, in that process, they should have contacted A.7 also, which is clinchingly proved.

111. The STD Booth owner has been examined as P.W.39. From P.W.39, Ex.P.53 call roll, relating to Booth No.30893 was recovered by the Inspector of Police. Ex.P.53 would disclose that calls emanated from this booth to Tirunelveli, the Phone Number of John Pandian i.e. 72324 on 3.8.1993, 6.8.1993, 9.8.1993, 10.8.1993,

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11.8.1993, 13.8.1993 and 16.8.1993 i.e. even one day prior to the actual attack on Vivek, on 17.8.1993. It is not possible from the call roll, to know, authentically, who has made the calls, from the said STD Booth, but it could be seen, to whom the calls were made. It is proved by Ex.P.53, from Ukkadam STD Booth, Coimbatore, owned by P.W.39, frequent calls were made to John Pandian (A.7), whether he personally attended or not. As a leader of a political party, as submitted by his counsel, A.7 might have received calls even from Coimbatore. Except these calls, if no other evidence is available, it could be said, Ex.P.53 may not have the grip of connecting A.7. Here, it was brought to surface, that already some of the accused had, contacted A.7. The circumstances coupled with frequent calls available in Ex.P.53, read together, the possible inference should be conspiracy was a live wire, between these accused. If it is not the case, it is the duty of A.7 to explain, from whom, he had received those calls, in view of the specific allegations against him, as if he was contacted by A.4 or A.5,A.6, as the case may be. As spoken by P.W.30, A.6 used to call from the STD Booth, near the shop, which is owned by P.W.39. The fact that A.6 accompanied from Coimbatore to Madras, then returned to Coimbatore, stands proved, for the reasons assigned by us. Therefore, if we read ex.P.53 coupled with the above proved fact, the only reasonable inference or conclusion that could be drawn is, pursuant to the conspiracy, A.6 should have contacted A.7, for making arrangement to accomplish the act viz. attacking or assaulting Vivek, which was precisely executed on 17.8.1993. Next we have to see, whether these acts are strengthened, further proved by any other circumstances.

112. The main thrust of the prosecution, to prove the involvement of A2, A4 and A6 is their arrest and recovery of certain material objects, claiming as proved, not explained properly by the accused, thereby requesting the Court to draw an adverse inference or presumption as indicated in the Supreme Court rulings. According to the prosecution, at the first instance, A2 was arrested, which led to the arrest of A4, A6 and A8, for which purpose, much aid is sought from the oral evidence of P.W.38, buttressed by the investigating officer P.W.56's testimony.

113. On the other hand, a strong attack was made on behalf of the accused/appellants, that the arrest projected by the prosecution through P.W.38 and P.W.56 must be false, which could be seen even from the evidence available in their oral testimony and in this view, believing their testimony, arrest could not be believed, which should follow the recovery also should fail. It is the further submission of the learned senior counsel for A2 that the amount said to have been recovered from A2 belonged to his father, who retired recently, prior to his arrest and at that time he was paid the gratuity, which amount was recovered, as if the amount given to A2 to be paid to A4 and A6, pursuant to the conspiracy for hiring the terminators through A7. Therefore, it is the duty of the Court to

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carefully scrutinize the oral evidence of P.W.38 and P.W.56, as well as the confession statements said to have been given by those accused and the mahazar or the search list, as the case may be.

114. According to P.W.38, on 29.8.1993, when he was standing in Karuppanna Gounder Street near Chellamuthu Fruit Commission Mandi, the second accused by name Sivakumar was proceeding towards north, having a yellow bag in his hand. He has stated further that at that time, the Inspector attached to B2 Police Station came there with his party and arrested him in his presence, which is also witnessed by one Rajan. According to him, at the request of the Inspector, he and another man agreed to be the witnesses and thereafter, when the Inspector examined A2, he has given a statement disclosing that he is having a sum of Rs.21,000/- in his house and if he was taken to his house, he will take out and hand over the same. The admissible portion of confession is exhibited as Ex.P.42. He has further stated that from A2, the Inspector recovered the yellow bag-M.O.9 as well as a sum of Rs.1 lakh from the said bag (M.O.8) under the cover of mahazar Ex.P.43. The oral evidence of P.W.38, not shattered to be thrown out, is not only supported by the evidence given by P.W.56, but also by Ex.P.42 and Ex.P.43. In Ex.P.43, in column No.6, particulars of M.Os.8 and 9 were given, in which P.W.38 as well as the Inspector had signed on 29.8.2003. In accepting their evidence, we find no difficulty and doing so, we would conclude that only from A2, M.O.8 which was in M.O.9 should have been recovered as disclosed by Ex.P.43.

115. It is the further statement of P.W.38 that pursuant to Ex.P.42, A2 took the Inspector, accompanied by him and another witness, to his house at Kunniamuthur, wherefrom he took out Rs.21,000/- from a trunk box and handed over the same to the Inspector, which was recovered under Ex.P.46. This is the evidence of P.W.56 also, supported by Ex.P.46. Though Ex.P.46 is described as search list, i.e. Form-98, it is evident from the evidence that the same was prepared as mahazar, pursuant to the disclosure statement, which could be seen from column No.3 of Form 98, where it is said "upon confession of accused", thereby showing this document was prepared, though it was named as search list, based upon disclosure statement- Ex.P.42. Thus it is made out undoubtedly that P.W.56 has recovered or seized a sum of Rs.1,21,000/- from A2, as a whole.

116. The prosecution case is that out of the above said sum, Rs.1 lakh was intended to be disbursed to A4 to A6, whereas Rs.21,000/- was retained by A2 probably towards his share, as reward, for the role played by him in the conspiracy. The recovery on 29.8.1993 to the above said extent is also admitted by A2, in the statement filed by him under Section 233(2) Cr.P.C. when he was examined under Section 313 Cr.P.C. Having admitted the recovery, A2 would contend that out of Rs.1,21,000/-, Rs.90,000/- belongs to his

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father, which he got when he retired and the balance amount would represent the savings of the family members. In view of the fact the recovery of Rs.1,21,000/- is admitted, whether it is on the basis on the confession or on the basis of the search, as rightly submitted by the learned senior counsel for the State, it is for him (A2) to explain the huge amount, who is not a rich man, whereas he was working only as an office boy under A1.

117. To explain possession of Rs.90,000/- aid is sought from the oral evidence of P.W.52, who was working in the Vijayalakshmi Mills Ltd, as Time Keeper elsewhere in the year 1993. As Timekeeper, it may not be possible for P.W.52 to speak about the account maintained by the Mill or the disbursement of cash to the workers at the time of the retirement. However, when he was cross examined by A1 and A2, he would state that the father of A2 retired either at the beginning of 1993 or at the end of 1992 and at that time, the retiral benefits were given to him, exhibiting his ignorance regarding the actual amount relating to gratuity, P.F., etc. However to help A2, he would state both the amounts may be to the tune of Rs.90,000/- or Rs.95,000/-. It is universally known that at the time of retirement of the workers, no company would pay the retiral benefits in cash, and if at all, the amount representing gratuity or P.F. would have been paid by DD or cheque, as the case may be. In that case, the father of A2 might have encashed the same, only through his bank account, which should be available with him, though he is said to be immobilized, by paralysis attack. For the reasons best known to A2, neither he has examined his father, nor produced the account or not even informed the court, the actual date of retirement or the actual amount paid, etc. Therefore, it is highly improbable and unbelievable that a sum of Rs.90,000/- should represent the gratuity amount of A2's father, out of Rs.1,21,000/-. True, law does not mandate that the accused must prove strictly, whereas law expects that the explanation should be probable and acceptable and for that limited purpose, at least materials should have been placed, since it should be available, if the defence is true, to dispel or reject the recovery, which would incriminate otherwise A2. Thus viewing the case from the recovery angle, as well as from the angle of non explanation by A2, the irresistible conclusion should be, that the amount recovered from A2 must be the amount paid to him by A1, in order to pay the same to A4 and A6. In this context, it is to be seen how A2 should have received the amount from A1, whether A1 should have given the amount to A2 and what are the materials produced and available.

118. It is not only an admitted fact, but also a proved fact, that on 30.7.1993, A.1 has issued a self cheque- Ex.P.24, for Rs.3 lakhs and the same was handed over to A.2 for its encashment. A.1, in his statement given under Section 233(2) Cr.P.C., would admit about the issue of cheque, as well as the encashment by A.2, which

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is also admitted by A.2. But, A.2 would contend that after encashing the amount, he handed over the same to the Mill and it is the stand of A.1 also that cash was received by the Mill, and one Rangasamy had spent the same, for legitimate expenses. It is the usual practice of any Mill or any company, that if from the bank account amounts are withdrawn to be paid to other mill or company, by cheque, it would be drawn only in the name of the Mill or Company, not by issuing a self-cheque by the signatory. Contrary to this, Ex.P.24-cheque was drawn by A.1 and encashed through A.2. It is the statement of A.1 that his grand-father requested to give amount from VLB Textiles, since the amount has to be paid by Vijayalakshmi Mills to Vysya Bank, obliging the same, in order to diburse the salary, Ex.P.24-cheque was signed, encashed and spent for legitimate purpose. If it is so, nothing would have prevented the first accused, from issuing the cheque in favour of Vijayalakshmi Mills Ltd. or endorsing the same in the name of Vysya Bank, where Vijayalakshmi Mills Limited is having its account, showing the credit entry in VLB Textiles Account. No such entry is available in the account book recovered. If the amount was given to Vijayalakshmi Mills Limited, there must be corresponding debit and credit entries in the account of VLB Textiles and Vijayalakshmi Mills and significantly, they are not produced. In fact, after 30.7.1993, no account was produced to prove the withdrawal of the cash, by the Mill, and its disbursement either by Vijayalakshmi Mills Ltd. or by VLB Textiles or disbursement of salaries to the workers, as the case may be. In this context, we have to refer the oral evidence of P.W.24 and 25.

119. As spoken by P.W.24, VLB Textiles used to take the cash as and when it comes to the account, leaving the minimum balance and it is his further evidence, that the maximum amount detained by the company between 16.7.1993 and 30.7.1993 was only Rs.3,97,000/-. He would further state, since a man from Coimbatore came with a cheque of Rs.3 lakhs, he confirmed about his identity, by examining P.W.25 and then only paid the amount. It is also spoken by P.W.25 that on 30.7.1993, from the bank, he was called through phone, to identify a person, who came to the bank for the encashment of Rs.3 lakhs, probably unusually also and at the request, he went to the bank and identified A2. It is the further statement of P.W.25, after encashment, when he requested A2, whether he has to inform about the encashment to the Mill, he said to him, not necessary, which would imply that the transaction was a clandestine one, probably, the amount was not intended to be paid either for labourers or to the other company, as the case may be. However, on behalf of the accused, our attention was drawn to the oral evidence of P.W.52 to show that the amount drawn by A.2 was handed over to the Mill, which was in turn disbursed later on. As we have already adverted to above, P.W.52, being a Time Keeper, not being an accountant or cashier, may not have any role to play with the cash and account and

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in this view, he is incompetent to say about the disbursement of cash to anybody. However to oblige A1 or A2, when he was cross examined by them, he would state that on 30.7.1993, Sivakumar (A.2) went to the bank and when he requested for payment, cashier informed them on the arrival of Sivakumar, he would pay the amount. He would further state that the cashier paid the amount after 1 or 2 hours later. It is not the case of P.W.52, when he was present along with the cashier, A.2 came to the office of Vijayalakshmi Mills Ltd, handed over the amount. No account also produced to show Rs.3 lakhs received from VLB Textiles in cash on 30.7.1993. This being the position, when there is no corresponding entry in Vijayalakshmi Mills account, it is highly impossible to accept the evidence given by P.W.52 during the cross examination by A.1 and A.2, as if money was paid to him and the same should represent the amount encashed by A.2, on the basis of the cheque issued by A.1. Vijayalakshmi Mills Limited and VLB Textiles are assessed to tax such as income tax, sales tax, etc. and therefore, they should maintain the accounts, for the day-to-day transaction such as day book, cash book, ledger, etc. If the complete accounts, relating to the period July 1993 and August 1993 had been produced, certainly that would disclose, throwing bright light, falsifying the prosecution theory, if the defence projected by A1 is true. For the non production of the entire account and for the incomplete account book produced to the investigating officer, we are inclined to draw an inference, which is legally permissible, that A1 should have withdrawn the amount of Rs.3 lakhs, through A2 only for the purpose of utilizing the same, in the conspiracy process viz., disbursing the same to the mediators or terminators, through A2 not for any other purposes as claimed. Because of the reason amount was given to A2, when A2 was arrested, a sum of Rs.1,21,000/- should have been recovered, thereby directly proving the involvement of A1 and A2 in the conspiracy, aiming the destination.

120. Mr.Nageswara Rao, the learned senior counsel for the State, brought to our notice the conduct of A.1, after the actual murder of Vivek, in order to demonstrate, that his hands should have involved in the conspiracy, otherwise, there would not have been any opportunity for him, to react in such a way, as spoken by P.W.27. P.W.27, admittedly, is a close friend of A.1. A.1 had so much of confidence also on P.W.27, as disclosed by his evidence. Therefore, there would not have been any necessity for P.W.27, to give evidence, exposing A.1, about his reaction, after the incident. According to P.W.27, on the date of the incident, at about 12 mid night, A.1 called him, through phone, and informed that a woman, calling herself as Sunitha, phoned him and scolded him, in English, as if he had planned to commit the murder of Vivek and cut the phone also and saying so, he was dejected. According to P.W.27, A.1 further informed him, through phone, at mid night, that he should call Sunitha (P.W.3) and ascertain, whether she had called A.1, as said above, for which his reply was, it may not be possible to call Sunitha, during mid night, and if at all, he would call her next

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morning and inform A.1. But, A.1, not satisfied with the answer given by P.W.27. According to him, within half-an-hour or so, at about 1.00 a.m. (night), A.1 came to his house and at that time, he was pale and sweating. It is the further case of P.W.27 that A.1 requested him, once again, to call Sunitha, but, refusing to do so, he sent him back, on the night itself. As indicated above, even on the night, prior to the incident, these people had been to a cinema, showing the closeness. If A.1 had no wicked mind, when some woman, calling herself as Sunitha, through phone, scolded him, as if he is the cause for the murder of Vivek, pre-planning, in the normal course, because of the closeness claimed by A.1, he should have straight away, called Sunitha and requested her, whether she had called him through phone, saying so. Instead of doing so, the very fact, he had approached P.W.27, would disclose the wicked mind of A.1 and in our considered opinion, that is why, A.1, instead of approaching P.W.3, to ascertain whether the call made in the name of Sunitha, approached P.W.27, during mid-night, not even waiting till the next day. Thereafter, he has absconded, as spoken by the investigating agency. This conduct and the appearance of A.1, on the night of the incident, as spoken by P.W.27, demonstrate, that A.1 should have hatched the plan - conspiracy - and that is why, his inner conscious pricked him, and to find out whether his wicked mind is known to others, not even waiting till the next day, he rushed to P.W.27, to know the information. If A.1 was not the cause, for the murder of Vivek, when he had approached P.W.27, he should have seen, in the normal position, not in the extraordinary position viz. frightened.

121. Mr.N.Natarajan, learned senior counsel for A.1, would submit that after the incident, when he came to know the actual murder of Vivek, he went to the scene of crime and even attempted to help P.W.3, which would belie the conspiracy. By going through the evidence available, in this regard, we are unable to persuade ourselves, to accept the above submission. P.W.1 would admit, during the cross-examination, that Venkatram (A.1) was present, during the cremation of Vivek and the cremation came to an end at 10.00 p.m. P.W.7 would state, when the body was removed from the scene of crime, at about 1.00 p.m., P.W.3 was there and Venkatram (A.1) was standing near him. P.W.7, seeing the plight of P.W.3, according to him, informed Venkatram-A.1 that he could take Sunitha in his car. After all, P.W.7, A.1 and P.W.3 are all close friends. In this view, if A.1 had an innocent mind, no bad intention, or if he had not committed any sin of crime, in the ordinary course, helping the friends, he would have accepted the offer made by P.W.7, to take P.W.3, whether she would have accepted the same or not. On the other hand, according to P.W.7, Venkatram (A.1) had said that 'if we take Sunitha, others would view otherwise', which would indicate, his mind was not pure, whereas it is stained, in the sense, he had an eye over Sunitha and because of this fact alone, his inner mind warned him, or gave an indication that if Sunitha was taken in his car, that would be viewed, by others, otherwise.

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Therefore, the submission of the learned senior counsel Mr.N.Natarajan, that A.1 was present, after the incident, in the scene of crime and he was present even at the time of cremation, will not give a clean-chit to him and that is why, when he met P.W.27, A.1 was not alright. Though the above incidents are after the accomplishment, they would prove in a way, the role played by A.1.

122. According to P.W.56, after the examination of A2, at the first instance, he took him and the witness to Rajaveedhi-Thermutti; and upon identification by him, he arrested Abudl Kareem-A6 and Ubaiyathullah @ Tamil Selvan-A4 at about 3.00 p.m. on 29.8.1993. He has further stated, that when A4 and A6 were examined separately, A4 confessed under Ex.P.44, whereas A6 confessed under Ex.P.45 informing that they will handover the cash, watch, chain as well as scooter in the presence of P.W.38.

123. P.W.38 also testified about the confession given by A4 under Ex.P.44 as well as A6 under Ex.P.45. It is the further statement of P.W.38, pursuant to confession of A4, he took them to his house at Kuniyamuthur Maniakarar Street wherefrom he took out a Titan Watch - M.O.11, Rs.23,000/- (M.O.12) which were recovered under the cover of mahazar Ex.P.47. Thereafter according to P.W.38, Abdul Kareem took them to his house situated at Ukkadam Gouse Mohideen Colony wherefrom he took out two sovereigns chain (M.O.13), two receipts as well as cash of Rs.18,000/- (M.O.14) and handed over the scooter M.O.15 also, which were recovered under Ex.P.48. This evidence is fully supported and corroborated by the oral testimony of the investigating officer, buttressed by the above said documents. Exs.P.47 and 48 though labeled as house search list being the prescribed Form No.98, they are in effect used as mahazars under which the properties were recovered pursuant to the disclosure statements. The reasons assigned by us for Ex.P.46 are well applicable to those documents also. Even assuming that there was some illegality or irregularity in preparing those documents, as pointed out by us supra, placing reliance upon the Apex Court ruling, the evidence collected under these documents will have its credence and the same cannot be erased. Thus it is well established beyond all reasonable doubt that portions of the amounts given to A4 and A6 early, for performing their duty as conspirators, were recovered only on the basis of the identification by A2, as well as on the basis of the confession statements given by them, which would certainly connect A2, A4 & A6 with the conspiracy, in view of the further fact, that there is no explanation forthcoming about the amount owned and possessed by these people, which were recovered in large sum, considering their status.

124. On the same day i.e. 29.8.1993, according to P.Ws.38 & 56, A1 was arrested in his house. Upon examination, according to P.W.56, A1

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also confessed under Ex.P.49 to take out a pair of diamond studs as well as the photo of P.W.3. Pursuant to Ex.P.49, under Ex.P.50, M.Os.16 & 17 were recovered. M.O.17 is the photo of P.W.3, which should have been cut from the combined photo along with the deceased Vivek – M.O.20, which was recovered from the car and compared by the expert, as discussed by us supra. For the purpose of identifying the deceased, cutting the photo of the deceased from the album, A1 should have handed over M.O.20 to other conspirators retaining the photo of P.W.3 along with diamond studs very safely, since he had her in his heart though P.W.3 was married to the deceased. The very fact M.O.17 was preserved in a secured place by A1 would prove clinchingly that he should be the cause for handing over M.O.20 to the other conspirators and this proved fact, lead us to take the only inference, that pursuant to the conspiracy, A1 should have paid a sum of Rs.3 lakhs to A2, as well as handed over the photo of the deceased M.O.20 for identification. Thus, the actual involvement of A1, in our considered opinion, is well proved by the recovery of M.O.17 as well as the recovery of M.O.16, which were shown to P.W.3, when there was an occasion for him to say about his future wife for whom according to him, he had purchased the diamond studs.

125. In Ex.P.42, it is said, இந்த ஒரு லட்சம் ரூபாய் பணத்தையும் பையிலே போட்டுட்டு, எடுத்துட்டு, உபயத்துல்லாவையும் கூட்டிட்டு இங்கே வந்தப்போ உங்களிடம் பிடிப்பட்டேன், which is marked as Ex.D1, which would indicate that all of them (A.2, A.4 & A.6) were arrested together and A4 and A6 were not arrested on identification by A.2. On the other hand, it is the evidence of P.Ws.38 and 56 that upon identification by A.2, taking them to Thermutti Rajaveethi, A.4 and A.6 were arrested. Placing reliance upon Ex.D.1, a strenuous argument was advanced, on behalf of the accused/appellants as if the arrest of A.4 and A.6 must be false, which should compulsorily lead to the inference, that the recovery of the above said M.Os. also must be false. Though the above wordings, would disclose, as if all were present at the same place, factually, it is not the case, as clinchingly proved. While recording the statement, there was some error, which is sought to be taken advantage of by the accused. In our view, the statement given by A.2 must be "எடுத்துட்டு உபயத்துல்லாவையும் கூட்டிட்டு போக இங்கே வந்தப்போ". The omission of some word, as indicated, is now sought to be taken advantage. The advantage sought to be taken by A.4 and A.6 playing on the word "கூட்டிட்டு இங்கே வந்தப்ப", failed to inspire us to eclipse the arrest of A4 and A6, which is convincingly and inspiringly proved by the oral evidence of P.W.38 and P.W.56. In this view of the matter, in our considered opinion, Ex.D1 would not eclipse the arrest of A4 and A6.

126. It is the case of the prosecution, that A8 was arrested, upon identification by A.6 at Udumalaipettai in a lodge. It is admitted by P.W.56 that in the confession statement of A.6, he has

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not stated, that he would identify A8. The oral evidence of P.Ws.32 and 36 would disclose, that on 19.8.1993, A.8 was in a police station at Tirunelveli, where it is said A.7 had identified A.8, giving certificate for his release also. After 17.8.1993, the date of actual attack, there was no necessity for A8, even according to the prosecution, to go to Udumalpet and stay in a lodge, that too after 12 days or so. No connecting material is produced to show how A6 came to know that A8 was staying at Udumalpet in a lodge when he was arrested on 29.8.1993. By going through the trip-sheet also, as far as entry relating to Udumalpet trip, a doubt has arisen in our minds, regarding its genuineness. After the accomplishment, no case is projected, as if A.9 to A.11 had utilised the service of A.8, using the car and in that process, he should have come to Udumalpet. Admittedly, neither A.9 to A.11 nor A.8 belong to Coimbatore District and therefore, in the ordinary course, A.8 would not have come to Udumalpet unless the taxi was taken by somebody, on hire. Therefore, it is highly doubtful whether A.8 would have been arrested pursuant to the identification by A6.

127. It was urged on behalf of the accused/appellants, placing reliance upon the remand reports, as if A.6 was also remanded to custody, and therefore, certainly, A.6 would not have identified A.8. But, the oral evidence of the Investigating Officer would indicate, undoubtedly, A.6 was not remanded, prior to the arrest shown for A.8. For the reasons assigned supra, a spontaneous doubt has arisen, about the actual arrest of A.8, pursuant to the alleged identification by A.6. Therefore, it is not possible to connect A.8, on the ground that A.6 had identified him and therefore, A.8 also should have played any role in the conspiracy. However, the fact remains that from the car owned by P.W.32, which was driven by A.8, during the relevant period of attack, photo of Vivek, another part of M.O.17, was recovered and to this extent, we find it could be relied on. This fact would connect the other accused, who traveled in the taxi driven by A.8 and certainly, it would not implicate A.8, either in the involvement of conspiracy or the actual role, if any, played by him. Nowhere it is stated, through anybody A.8 had played any role in the conspiracy, preceding to the date of attack on 17.8.1993. If at all, as taxi driver, either at the command of A.7 or on his own, A.8 should have taken the taxi from Tirunelveli, proceeded to Ooty via Coimbatore and returned on 17.8.1993, thereby bringing the assailants to the scene of crime, then taking the terminators from the scene of crime also to elsewhere, which is in our considered opinion, may not be sufficient and conclusive proof, to convict A.8 under Section 302 r/w 109 I.P.C. or 120-B I.P.C., as the case may be. After the attack by A.9 to A.11, though an inference could be drawn, as if they should have travelled in the car driven by A.8, none had identified the car, as if they have seen near the scene of crime and no bloodstain also noticed in the car, since it is said, A.9 travelled, after the

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assault, with bloodstained weapon also. Thus, there is a snap in the circumstance alleged against A.8, thereby taking him out, from the conspiracy. But, unfortunately, the learned trial Judge, taking into account the arrest of A.8, as if it is proved, as well as the recovery of photo and cash from the car, would connect him, with the conspiracy, convicted A.8, which is not acceptable to us. Assuming that pursuant to identification by A.6, A.8 was arrested and properties were recovered, they failed to connect A.8 either with the conspiracy or his actual involvement in the crime. The learned senior counsel for the State would submit that because of the involvement of A.8 also, in the conspiracy, he should have taken the assailants in the car, driven by him, and some of the material objects were also recovered from the car. It is a settled position, that in the course of conspiracy, a person, who comes in the middle, joins to reach the destination with common intention, also answerable under Section 120-B IPC, provided, it is made out, that he joined in the conspiracy, having the common intention of all the conspirators, in this case, viz. murdering Vivek. Our effort, to find out any material, for the above purpose, ended in vain. The recovery of M.O.20 from the car, pursuant to the confession given by A.8, assuming true, failed to disclose the part played by A.8, as conspirator, having the common intention. Even the amount said to have been recovered, would represent the taxi fare, since, afterall he is a driver under P.W.32. For these reasons, A.8 is entitled to an acquittal, because of the absence of any connecting materials either in the form of circumstantial evidence or otherwise.

128. As far as A.7 is concerned, admittedly, he has not come to surface physically at any point of time, and he was always behind the screen. The stay of A.4 at Tirunelveli would disclose that he had contacted A.7 through phone and he had been to Chennai along with A.2, A.5 and A.6, then returned to Coimbatore on 19.7.1993. While they were staying in a lodge called Geetha Hall, Coimbatore, they have also contacted A.7 over the phone, which is well established by Ex.P.53 as discussed above, for which there is no explanation from A.7. A.6, though belong to some other party, repeatedly called A.7, as disclosed by Ex.P.53, for which, there is no explanation. If we read the repeated calls, as proved under Ex.P.53, coupled with the fact, A.2 and A.4 to A.6 travelled all the way from Coimbatore to Tirunelveli, where they have also attempted to contact A.7, then went to Madras, then returned to Coimbatore should lead only to the inference, pursuant to the conspiracy alone, the above said actions should have been taken by A.6. This clinching circumstance, that the conspirators had contacted A.7 during the relevant period and A7 had association with the actual assailants, in our considered opinion, proved that he had played a key role an important role viz., engaging the assailants to terminate Vivek and in this view, A7 should be held responsible under Section 120-B I.P.C., as rightly held by the trial Court.

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129. In a case of criminal conspiracy, collecting direct evidence may not be possible for any prosecuting agency, since conspiracy is hatched in private or in secrecy. It is rarely possible to establish a conspiracy, by direct evidence. Usually, both the existence of the conspiracy and its objects have to be inferred from the circumstances and the conduct of the accused [vide FIROZUDDIN BASHEERUDDIN v. STATE OF KERALA [(2001) 7 SCC 596)]. On the other hand, satisfying the existence of the elements of a criminal conspiracy that could be well established and they are as held by the Apex Court in ESHER SINGH v. STATE OF A.P. (2004 (11) SCC 585):

> "(a) an object to be accomplished,
>
> (b) a plan or scheme embodying means to accomplish that object,
>
> (c) an agreement or understanding between two or more of the accused persons whereby, they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means, and
>
> (d) in the jurisdiction where the statute required an overt act."

It is also observed in the above decision as follows:

> "the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both, and it is a matter of common experience that direct evidence to prove conspiracy is rarely available. Therefore, the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused".
>
> (para 35)

130. In a case where number of accused are involved, it is not mandatory that all the conspirators must know each and every detail of the conspiracy, as long as they are co-conspirators in the main object of the conspiracy [vide YASH PAL MITTAL V. STATE OF PUNJAB (1977 (4) SCC 540]) and the only relevant factor is that all means adopted and illegal acts done must be and purported to be in furtherance of the object of the conspiracy even though there may be sometimes misfire or overshooting by some of the conspirators. Thus saying that there was no actual link between the accused or there was no connection between the acts said to have been performed by each accused, one cannot so easily escape, if the conspiracy is

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proved on the basis of the agreement and the determination to commit the offence. Even in the absence of agreement as to the means by which the purpose is to be accomplished, once the illegal act is completed on the basis of the criminal conspiracy, that is sufficient and the agreement as to the means need not always proved by clinching evidence.

131. As ruled by Apex Court in FIROZUDDIN BASHEERUDDIN's case:

> "A man may join a conspiracy by word or by deed. However, criminal responsibility for a conspiracy requires more than a merely passive attitude towards an existing conspiracy. One who commits an overt act with knowledge of the conspiracy is guilty. And one who tacitly consents to the object of a conspiracy and goes along with other conspirators, actually standing by while the others put the conspiracy into effect, is guilty though he intends to take no active part in the crime".

In this view, eventhough the act of A.7 is not directly proved or established, the criminal responsibility, pursuant to the conspiracy, charged upon A7, according to the prosecution, is made out and hence he could be held responsible.

132. The learned counsel for the accused/appellants would contend that there was no investigation to find out whether the deceased Vivek had enmity with some other persons, in the financial business, whether there was any possibility of attacking by those persons and in this view, since the same is not ruled out by proper investigation, the appellants cannot be fixed, as the assailants, on the basis of the circumstances, which are sought to be focused upon them.

133. As an answer to the above submission, Mr.L.Nageswara Rao, the learned senior counsel appearing for the State would contend, that even if any defective or bad investigation has been done, or tainted investigation was performed or any irregularity or illegality had occurred in the action taken by the investigating officer, that would not come in the way of fixing the culpability upon the accused, on the basis of the evidence collected and produced, if they are otherwise acceptable, placing reliance upon the decisions rendered in

(1) DHANRAJ SINGH vs. STATE OF PUNJAB (2004 (3) SCC 654);

(2) STATE OF KARNATAKA vs. K. YARAPPA REDDY [(1999) 8 SCC 715);

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(3) VISVESWARAN vs. STATE REP. BY SDM [(2003) 6 SCC 73] and

(4) LEELA RAM vs. STATE OF HARYANA [(1999) 9 SCC 525].

134. In the first case, it is held that the defective investigation is not fatal to the prosecution where ocular testimony is found credible, cogent and acceptable. In the second case, viz., STATE OF KARNATAKA vs. K. YARAPPA REDDY, it is held as follows:

> "If the other evidence, on scrutiny, is found credible and acceptable, should the Court be influenced by the machinations demonstrated by the investigating officer in conducting investigation or in preparing the records so unscrupulously? It can be a guiding principle that as investigation is not the solitary area for judicial scrutiny in a criminal trial, the conclusion of the court in the case cannot be allowed to depend solely on the probity of investigation. It is well-nigh settled that even if the investigation is illegal or even suspicious the rest of the evidence must be scrutinized independently of the impact of it. Otherwise the criminal trial will plummet to the level of the investigating officers ruling the roost. The court must have predominance and preeminence in criminal trials over the action taken by investigating officers. Criminal justice should not be made a casualty for the wrongs committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true the court is free to act on it albeit the investigating officer's suspicious role in the case".

135. In LEELA RAM's case, cited above, the Apex Court has observed,

> "It is now a well-settled principle that any irregularity or even an illegality during investigation ought not to be treated as a ground to reject the prosecution case and we need not dilate on the issue excepting referring to a decision of this Court (vide STATE OF RAJASTHAN v. KISHORE – 1996 (8) SCC 217)."

In the light of the law settled by the Apex Court, even assuming that there was some failure on the part of P.W.56 during the investigation, such as in preparing the documents as search list, instead of mahazar certainly that will not come to the aid of the accused to have a clean chit of acquittal.

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136. The investigating officer, while examining some of the accused, as indicated above on the basis of disclosure statements, while recovering some material objects, instead of preparing mahazar, had prepared or filled up the search list (Form-98), thereby showing some irregularity (if at all). The learned senior counsel appearing for the State, would contend, inviting our attention to STATE OF M.P. vs. PALTAN MALLAH [(2005) 3 SCC 169] that evidence obtained under illegal search or seizure is not completely excluded, and such evidence could be admitted, provided there is no express statutory violation or violation of the constitutional provisions, since general provisions in Cr.P.C. are to be treated as guidelines and if at all, there is any minor violation, still the court can accept the evidence. While dealing the above circumstances, it is observed:

> "In India, the evidence obtained under illegal search is not completely excluded unless it has caused serious prejudice to the accused. The discretion has always been given to the court to decide whether such evidence is to be accepted or not".

It is further observed that,

> "The trend of judicial pronouncements is to the effect that evidence illegally or improperly obtained is not per se inadmissible. If the violation committed by the investigating authority is of serious nature and causes serious prejudice to the accused, such evidence may be excluded."

In this case, if at all, it could be said, instead of preparing mahazar, for the recovery of the material objects, the investigating officer had used Form-98 i.e. the search list and the same could be termed only as minor abrasion, not causing any prejudice to the accused.

137. One of the circumstances relied on by the prosecution to rope in A1 under conspiracy is his abscondence after the incident, till he was apprehended on 29.8.1993. The Hon'ble Supreme Court in DHANANJOY CHATTERJEE vs. STATE OF W.B. (1994 SCC (Crl) 358) and USMAN MIAN vs. STATE OF BIHAR [(2004) 10 SCC 786] has taken the view, that abscondence of accused after the occurrence should be considered as an important and vital circumstance against the accused, though it was the opinion, originally that abscondence of the accused from the place of their business at the relevant time was not a factor to prove the guilt.

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138. In a case where the prosecution mainly relies upon circumstantial evidence on proof of certain facts, failure to explain the incriminating circumstances and the silence of the accused in respect of the incriminating circumstances, would supply the missing link, for completing the chain of circumstantial evidence as ruled by the Apex Court in GANESH LAL vs. STATE OF RAJASTHAN (2002 (1) SCC 731).

139. The submission of the learned senior counsel appearing for the accused/appellants, that there is no evidence, as if all the accused were seen together, may not have any relevance, since it is not necessary that all the conspirators should join together, while planning and executing the offence. On the other hand, if the intention of all the accused is proved, that all of them were aiming to the same end, that itself is sufficient. The prosecution has established the conspiracy, by proving:

i) A.1 was dejected, not only because of the refusal by P.W.3, to marry him, accepting the love affair, but also proving his marriage life with Sherry was not so happy;

ii) that A.1 had given a self-cheque to A.2, which was encashed by him, not brought to the account of any mills, thereby showing, that amount should have been utilised, which was also recovered;

iii) the conduct of A.1, after the incident, which strengthens the conspiracy;

iv) A.2 had reserved the train tickets not only for him, but also for three accused;

v) their stay at Tirunelveli;

vi) their search of A.7 or meeting him at Chennai,

vii) then, by reserving tickets from Chennai Central to Coimbatore; and

viii) then, whenever necessary, they have contacted A.7

and the accomplishment of the conspiracy also.

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If we analyse the above said circumstances, on the touch-stone of the legal principles enunciated by the Apex Court, the possible and the only inference should be, at the instance of A.1, instigating A.2, they have contacted A.7, through A.4 to A.6, who, in turn, engaged A.9 to A.11, who have actually executed the plan and in this view, in our considered opinion, the conviction slapped upon A.1, A.2, A.4, A.5, A.6, A.7 and A.9 to A.11 should be confirmed, whereas the conviction slapped upon A.8 alone should go.

140. Before parting the case, we feel, it may not be out of place, to record our appreciation, the way the Investigating Officer has performed his duty, in unearthing the crime, uninfluenced, despite there might have been tremendous pressure, for which he also deserves our patting and we do so.

The result, therefore, is,

i) The Criminal Appeal No.121 of 2003 (filed by John Pandian-A.7); Criminal Appeal No.168 of 2003 (filed by S.Venkataramakrishnan alias Venkatram alias Thambu-A.1); Criminal Appeal No.375 of 2003 (filed by (1)Kumar, (2) Pavun Raj @ Pavun and (3)Prince Kumar @ Prince @ Balan – A.9 to A.11 respectively), Criminal Appeal No.391 of 2003 (filed by Sivakumar-A.2), Criminal Appeal No.395 of 2003 (filed by Yusuf-A.5 and Abdul Kareem @ Kareem-A.6) and Criminal Appeal No.945 of 2003 (filed by Ubaiadulla @ Tamilselvan-A.4) are dismissed, confirming the conviction and sentence passed against them by the learned Additional Sessions Judge (Fast Track Court No.1), Coimbatore, in Sessions Case No.149 of 1996, dated 6.1.2003.

ii) Criminal Appeal No.379 of 2003 (filed by Ganesan-A.8) is allowed. He is found not guilty of the charges framed against him. Accordingly, he is acquitted from the case. He is ordered to be released forthwith, unless his detention is required in any other case. The fine amount, if any paid by him, shall be refunded to him.

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iii) Criminal Appeal No.1239 of 2004 (filed by the State against Subramaniam @ Subbukutty-A.3), is dismissed, confirming the judgment of his acquittal by the learned Additional Sessions Judge (Fast Track Court No.1), Coimbatore, in Sessions Case No.149 of 1996, dated 6.1.2003.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

Rao/kv/Vsl

To

1.The Additional Sessions Judge,
(Fast Track Court No.1),
Coimbatore.

2.The Principal Sessions Judge,
Coimbatore.

3.The District Collector,
Coimbatore.

4.The Superintendent,
Central Prison,
Coimbatore.

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5.The Inspector of Police,
B-2, R.S.Puram Police Station,
Coimbatore.

6.The Public Prosecutor,
High Court, Madras.

7. The Superintendent,
Central Prison, Vellore.

8. The Superintendent
Central Prison, Palayamkottai.

1 cc to Mr.L. Mahendran, Advocate, Sr. 17265
1 cc to Mr.S. Kadarkarai, Advocate, Sr. 16464
1 cc to Mr.G. Ravikumar, Advocate, Sr No. 16945
2 cc to Mr. Gopalakrishna Lakshmana Raju, Advocate, Sr. 16824, 16825
1 cc to Mr.M. Balasubramaniam, Advocate, Sr. 16487
1 cc to the Public Prosecutor, High Court, Madras, SR. 16489

Crl.A.121/2003
etc. batch.

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